Supreme Court, U.S.
FILED
JUL 27 2004
OFFICE OF THE CLERK

No. 04 149

In The
Supreme Court of the United States

DEBORAH BAKER AND RICHARD ENYEART,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

IBP, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

G. ROBERT BLAKEY
Counsel of Record
NOTRE DAME LAW SCHOOL
Notre Dame, IN 46656-0780
(574) 631-5717

HOWARD W. FOSTER
JOHNSON & BELL, LTD.
55 East Monroe Street
Suite 4100
Chicago, IL 60603
(312) 372-0770

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does Section 159 of the National Labor Relations Act (29 U.S.C. § 159) that provides that statutory "representatives . . . shall be the exclusive representatives . . . for the purpose of collective bargaining in respect to . . . conditions of employment . . . " preclude former and present employees from suing for damages to their property (albeit measured by lost wages, though not a matter of collective bargaining), under RICO, a federal statute not part of the labor laws?

2. Does the presence of divergent goals among members of an association-in-fact "enterprise" under RICO (18 U.S.C. § 1961(4)), where the enterprise itself is bound by a common goal (or "purpose"), that is, the commission of a pattern of racketeering activity, fracture the required unity of the association-in-fact "enterprise"?

PARTIES TO THE PROCEEDINGS

PETITIONERS

Deborah Baker and Richard Enyeart, on behalf of themselves and all others similarly situated

RESPONDENTS

IBP, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THIS COURT SHOULD RESOLVE THE SPLIT BETWEEN THE SEVENTH AND THE SIXTH CIRCUITS ON THE RIGHT OF WORKERS TO SUE EMPLOYERS FOR MATTERS OUTSIDE OF THE COLLECTIVE BARGAINING PROCESS UNDER STATUTES THAT ARE INDEPENDENT OF THE LABOR LAWS WITHOUT THE INTERVENTION OF A UNION	5

TABLE OF CONTENTS – Continued

Page

II. THIS COURT SHOULD RESOLVE THE SPLITS BETWEEN THE SEVENTH CIRCUIT THAT LIMITS ENTERPRISE PLEADING TO THOSE NOT INVOLVING DIVERGENT GOALS AND (1) THE SECOND CIRCUIT THAT RECOGNIZED A SIMILAR ENTERPRISE PLEADING UNDER AN ILLEGAL IMMIGRATION SCENARIO, (2) THE SECOND CIRCUIT (AND OTHERS) THAT RECOGNIZE ENTERPRISE PLEADINGS IN THE ORGANIZED CRIME AREA, (3) OTHER CIRCUITS THAT UPHOLD ENTERPRISE PLEADINGS THAT REFLECT DIVERGENT GOALS, AND (4) THE FIRST, SECOND, AND NINTH CIRCUITS THAT RECOGNIZE ENTERPRISE PLEADINGS THAT INCLUDE FRAUD VICTIMS OF A RICO VIOLATION 8

III. SINCE ILLEGAL IMMIGRATION IMPOSES POLITICAL, ECONOMIC AND TAX, HEALTH, WELFARE, AND EDUCATION, CORRECTIONS, AND LAW ENFORCEMENT COSTS ON THE NATION, THIS COURT SHOULD REVIEW THIS PETITION NOW BECAUSE OF ITS NATIONAL IMPORTANCE AND TURN BACK EFFORTS TO UNDERMINE THE PRIVATE ENFORCEMENT MECHANISM ENERGIZED BY CONGRESS IN 1996 THAT IS A NECESSARY SUPPLEMENT TO LAW ENFORCEMENT 18

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Aetna Casualty & Surety Co. v. P. & G. Auto Body, 43 F.3d 1546 (1st Cir. 1994) 17

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 7

Agency Holding Corp. v. Malley-Duff & Assc., 483 U.S. 143 (1987) 28

American Society of Mechanical Engineers, Inc., 456 U.S. at 568 (1982) 28

Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) 27

Bachman v. Bear Stearns & Co., Inc., 178 F.3d 930 (7th Cir. 1999) 13

Baker v. IBP, Inc. 357 F.3d 685 (7th Cir. 2004) ..... *passim*

Blue Shield of VA. v. McCready, 457 U.S. 465 (1982) 28

Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991) 5

Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923 (7th Cir. 2003) 9, 13

Commercial Cleaning Services, L.L.C., v. Colin Services Systems, Inc., 271 F.3d 374 (2d Cir. 2001) 4, 8, 9

DeCanas v. Bica, 424 U.S. 351 (1976) 22

F.C.C. v. NextWave Personal Communications, Inc., 537 U.S. 293 (2003) 6

Fitzgerald v. Chrysler Corp., 116 F.3d 225 (7th Cir. 1997) 9, 13

H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) 2, 4, 28, 29

TABLE OF AUTHORITIES – Continued

Page

J. Truett Payne & Co. v. Chrysler Motor Corp., 451 U.S. 557 (1981) 22

Jacobson v. Cooper, 882 F.2d 717 (2d Cir. 1989) 17

Jund v. Town of Hempstead, 941 F.2d 1271 (2d Cir. 1991) 3

Mendoza v. Zirkle Fruit Co., 310 F.3d 1163 (9th Cir. 2002) 18

National Organization of Women v. Scheidler, 510 U.S. 249 (1994) 2

Northern Sec. Co. v. United States, 193 U.S. 197 (1904) 11

Office & Pro'f Employees Int'l Union, Local 2 v. FDIC, 962 F.2d 63 (D.C. Cir. 1992) 6

Pfizer, Inc. v. India, 434 U.S. 308 (1978) 28

Plyler v. Doe, 457 U.S. 202 (1982) 24

Pross v. Katz, 784 F.2d 455 (2d Cir. 1986) 5

Reves v. Ernst & Young, 507 U.S. 170 (1993) 11

Rotella v. Wood, 528 U.S. 549 (2000) 28

Russello v. United States, 464 U.S. 16 (1983) 11

Salinas v. United States, 522 U.S. 52 (1997) 13

Scheuer v. Rhodes, 416 U.S. 232 (1974) 2

Sedima, S.P.R.L. v. Imrex, Co., 473 U.S. 479 (1985) 28

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 11

Swierkiewicz v. Sorema NA, 534 U.S. 506 (2002) 5

T.V.A. v. Hill, 437 U.S. 153 (1978) 29

TABLE OF AUTHORITIES – Continued

Page

Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (19[illegible]) 29

Trollinger v. Tyson Foods, Inc., 370 F.3d 602 (6th Cir. 2004) 4, 5, 6, 7

United Energy Owners Committee., Inc. v. United States Energy Management Systems, 837 F.2d 356 (9th Cir. 1988) 17

United States v. Alonso, 740 F.2d 862 (11th Cir. 1984) 16

United States v. Amato, 15 F.3d 230 (2d Cir. 1994) 12

United States v. Angelilli, 660 F.2d 23 (2d Cir. 1981) 16

United States v. Barone, 114 F.3d 1284 (1st Cir. 1997) 13

United States v. Beasley, 72 F.3d 1518 (11th Cir. 1996) 15, 16

United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982) 14

United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983) 27

United States v. Coonan, 938 F.2d 1553 (2d Cir. 1991) 12

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995) 15

United States v. Elliot, 571 F.2d 880 (5th Cir. 1978) 14, 15

United States v. Griffin, 660 F.2d 996 (4th Cir. 1981) 11, 16

United States v. Norton, 867 F.2d 1354 (11th Cir. 1989) 16

United States v. Orena, 32 F.3d 704 (2d Cir. 1994) 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Riccobene, 709 F.2d 214 (3rd Cir. 1983) 13

United States v. Salerno, 868 F.2d 524 (2d Cir. 1989) 13

United States v. Tocco, 306 F.3d 279 (6th Cir. 2002) 13

United States v. Turkette, 452 U.S. 576 (1981) 29

Warner v. Alexander Grant & Co., 828 F.2d 1530 (11th Cir. 1987) 5

STATUTES:

TITLE 6, UNITED STATES CODE

§ 251 26

TITLE 8, UNITED STATES CODE

§ 1324 3

§ 1324(a)(3)(A) 3

TITLE 18, UNITED STATES CODE

§ 1961(1)(F) 3

§ 1961(1)(4) 16

§ 1961(4) 2

§ 1962(c) 2, 17

§ 1964(c) 2

TITLE 28, UNITED STATES CODE

§ 1254 1

TABLE OF AUTHORITIES – Continued

Page

TITLE 29, UNITED STATES CODE

§ 159 ..... 1, 4

§ 185 6

OTHER AUTHORITIES:

Edward Gross & Amitai Etzoini, ORGANIZATIONS IN SOCIETY 8-13 (1985) 10

Dudley L. Poston, et al., Center for Immigration Studies, *Remaking the Political Landscape: The Impact of Legal and Illegal Immigration on Congressional Reapportionment* 3 (2003) 20

Steven A. Camarota, Center for Immigration Studies, *The Impact of Immigration on American Workers: Testimony Prepared for the House Judiciary Committee Subcommittee on Immigration and Claims* 1 (2003) 21

George J. Borjas, *Increasing the Supply of Labor Through Immigration: Measuring the Impact on Native-born Workers* 2 (2004) 21, 22

NATIONAL RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 7 (James P. Smith & Barry Edmonston, eds., 1997) 21

Donald L. Huddle, *Immigration and Jobs: The Process of Displacement* (1995) 22, 23

Michael E. Fix & Jeffrey S. Passel U.S. IMMIGRATION: TRENDS AND IMPLICATIONS FOR SCHOOLS 16 (2003) 24

TABLE OF AUTHORITIES – Continued

Page

Rebecca L. Clark et al., FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES 8-13 (1994) 25

Rebecca L. Clark & Scott A. Anderson, ILLEGAL ALIENS IN FEDERAL, STATE AND LOCAL CRIMINAL JUSTICE SYSTEMS II (2000) 25

Nina Bernstein, *A Longer Wait for Citizenship and the Ballot, N.Y. Times* (2004) 26

Carl Kaysen et al., ANTITRUST POLICY 17 (1959) 29

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 30, 2004.

OPINIONS BELOW

The decision of the United States District Court for the Central District of Illinois is reported at 2002 WL 31696701 (Mihm, J.) and reprinted in the Appendix to this Petition.

The decision of the United States Court of Appeals for the Seventh Circuit is reported at 357 F.3d 685 (Easterbrook, J.) and reprinted in the Appendix to this Petition.

The order of the United States Court of Appeals for the Seventh Circuit denying the petition for rehearing before the panel or rehearing *en banc* is reprinted in the Appendix to this Petition.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Seventh Circuit was entered February 4, 2004. Petitioners' timely petition for rehearing was denied April 30, 2004.

STATUTORY PROVISIONS

29 U.S.C. § 159, in relevant part, provides:

> Representatives designated or selected for the purposes of collective bargaining . . . shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

18 U.S.C. § 1962(c), in relevant part, provides:

> It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .

18 U.S.C. § 1961(4), in relevant part, provides:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

18 U.S.C. § 1964(c), in relevant part, provides:

> Any person injured in his . . . property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States District Court . . .

STATEMENT OF THE CASE

A. Statement of Facts

Petitioners are former, lawfully employed, hourly-paid employees of Respondent IBP, Inc. (IBP)'s Joslin, Illinois, meatpacking facility.[1] The workers are unionized, and

[1] This statement of facts comes from the Complaint. (App. 24-36) At this stage, a court must accept the allegations as true, must construe them liberally, and must draw all reasonable inferences in favor of the plaintiff. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989). A court may not dismiss a complaint unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.*, at 249-509 (emphasis added; citations omitted). "[A]t the pleading stage, general factual . . . allegations embrace those specific facts that are necessary to support the claim." *National Organization of Women v. Scheidler*, 510 U.S. 249, 256 (1994) (citations omitted). "When a Federal court reviews the sufficiency of a complaint, its task is necessarily a limited one. The issue is not whether the claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

their wages were set by a collective bargaining agreement between IBP and the union. The collective bargaining agreement is silent as to the question of employing illegal workers.[2]

Petitioners' brought this putative class action for former and current employees under the Racketeer Influenced and Corrupt Organizations Act ("RICO")[3] for injury to their property[4] because their wage rates were depressed as a result of IBP's scheme for the employment of an unlawful workforce.

The crux of Petitioners' complaint was that their wages would have been higher had IBP not engaged in a scheme to employ unauthorized employees, that is, by expanding the labor market to include unauthorized workers that were willing to work at depressed wages and benefits.[5] IBP's "illegal immigrant hiring scheme" violated RICO (18 U.S.C. § 1961(1)(F)), which makes certain violations of § 274 of the Immigration and Nationality Act ("INA") predicate offenses.[6] Petitioners' alleged that: (1)

---

[2] "[T]o hire illegal aliens is not a . . . subject of collective bargaining . . . " *Baker v. IBP, Inc.*, 357 F.3d 685, 689 (7th Cir. 2004) App. 24-36

[3] 18 U.S.C. §§ 1961-1968, added to Title 18 by Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 941.

[4] "Lost wages" are "property" under RICO. *Jund v. Town of Hempstead*, 941 F.2d 1271, 1286 (2d Cir. 1991)

[5] *See infra* Part III for data on the affect of the employment of illegal immigrants.

[6] Section 274 of the INA is codified at 8 U.S.C. § 1324. In 1996, Congress enacted § 203 of the Illegal Immigration Reform and Immigrant Responsibility Act, 104 Pub. L. No. 208, 110 Stat. 3009, 566 (codified at 8 U.S.C. § 1324(a)(3)(A)), which amended § 274 of the INA to prohibit the employment of illegal aliens. Later that year, Congress enacted the Antiterrorism and Effective Death Penalty Act, which, *inter alia*, added the amended § 274 to RICO. Pub. L. No. 104-132, § 433, 110 Stat. 1274 (1996). These predicates were added "to help Federal law enforcement officials" because groups "in this country, with ties to others abroad, . . . [had] developed to prey upon illegal immigrants who want to come to the United States." 141 Cong. Rec. H1588 (daily ed. February 10, 1995) (statement of Rep. McCollum). Concern was also expressed over the high costs imposed by illegal immigration on the

(Continued on following page)

the IBP scheme violated § 274 of the INA and RICO,[7] and (2) they were proximately injured by receiving wages that were depressed, that is, below what they would have been in a lawful labor market. Petitioners "allege[d] that IBP . . . expanded the pool of available labor and thus depressed the price that labor can command. When supply rises and demand is constant, price falls." *Baker v. IBP*, 357 F.3d 685, 689-90 (7th Cir. 2004) App. 8 "[W]ages . . . [were] depressed by about four dollars ($4.00) per hour . . . " *Id.* at 687. App. 2

B. The Proceedings Below

The Seventh Circuit held that the complaint failed to state a claim for relief, and it dismissed it under Fed. R. Civ. P. 12(b)(6), for two reasons: (1) Petitioners were precluded from bringing a class action over wages by Section 159 of the National Labor Relations Act, 29 U.S.C. § 159 ("Section 159"), since the union is the "exclusive bargaining agent," and (2) the goals of the members of an

---

State and Federal Welfare and Corrections Systems. *See generally* the remarks of the various congressmen, *id.*

[7] The Seventh Circuit expressed skepticism about the "accuracy" of the allegations in the Complaint (*Baker*, 357 F.3d at 687), commenting that if the allegations were "true, managers at IBP . . . [had] committed hundreds of felonies . . . ," and wondered, if they were true, why the "United States . . . [had] not commenced a criminal prosecution." *Id.* While IBP has not been indicted, Tyson Foods, Inc., the subject of the Sixth Circuit decision in conflict with *Baker*, was the subject of an indictment (although it was not convicted, *see infra* nn.73-74) for its hiring of illegal aliens at 15 of its processing plants in nine different states. *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 606 (6th Cir. 2004)). Similarly, *Commercial Cleaning Services, L.L.C.*, the subject of the Second Circuit decision in conflict with *Baker*, was prosecuted for illegal alien offenses in 1996. *Commercial Cleaning Services, L.L.C., v. Colin Services Systems, Inc.*, 271 F.3d 374, 379 (2d Cir. 2001). Thus, this litigation is *not* an example of the commercial fraud disputes that so vexed members of this Court in the 1980's. Congress knew what it was doing in 1996 well after that controversy had abated in light of this Court's restrictive "pattern" decision in *H.J., Inc.*

association-in-fact RICO enterprise must not be "divergent."[8]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE SPLIT BETWEEN THE SEVENTH AND THE SIXTH CIRCUITS ON THE RIGHT OF WORKERS TO SUE EMPLOYERS FOR MATTERS OUTSIDE OF THE COLLECTIVE BARGAINING PROCESS UNDER STATUTES THAT ARE INDEPENDENT OF THE LABOR LAWS WITHOUT THE INTERVENTION OF A UNION.

The decision of the Seventh Circuit that holds that employees cannot bind together to sue their employer for damages to their "property" (albeit measured by lost wages) under a statute that is (1) not part of the labor laws, and (2) does not raise a matter under the collective bargaining agreement is in conflict with the decision of the Sixth Circuit in *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004). Because this is an important question of statutory interpretation at the heart of the employer-employee relation in the context of illegal immigration, a

---

[8] Necessarily included in this Petition are two procedural issues (pleading and amendment), in which the Seventh Circuit erred. *See supra* n.1 (true; liberal; inferences; relief; general/specific; evidence) & n.7. *Baker* resolved "divergent goals" and "participate in affairs" on a Rule 12 motion in violation of these pleading standards. 357 F.3d at 691-92. In fact, the complaint fully alleged each element. App. 28-35 As such, *Baker* also conflicts with the Sixth Circuit in *Trollinger*, 370 F.3d at 615 (citing *Swierkiewicz v. Sorema NA*, 534 U.S. 506, 514 (2002) (notice pleading)); 370 F.3d at 619 (proximate cause); 370 F.3d at 621 (enterprise). In any event, the appeal should be remanded to grant Plaintiffs an opportunity to amend. That this opportunity was not granted is in conflict with established procedure. *See, e.g., Branch v. Tunnell*, 937 F.2d 1382, 1388 (9th Cir. 1991); *Warner v. Alexander Grant & Co.*, 828 F.2d 1530 (11th Cir. 1987); *Pross v. Katz*, 784 F.2d 455, 459-60 (2d 1986).

pressing national matter, this split in the circuits should now be settled by this Court.

In *Trollinger,* as in *Baker*, plaintiffs, four individuals, on behalf of themselves and all others similarly-situated, brought a wage-related dispute between [themselves and] Tyson Foods, Inc. *Id.* at 606. As in *Baker*, "[they] allege[d] that Tyson violated RICO by engaging in a scheme with several employment agencies to depress the wages of Tyson's hourly employees by hiring illegal immigrants." *Id.* Relying upon *Baker*, Tyson urged the Sixth Circuit to concur in the Seventh Circuit's analysis and dismiss the case because "the [National Labor Relations Act (NLRA)] gives the union the exclusive right to prosecute it . . . *Id.* at 620.

The Sixth Circuit rejected "*Baker's* suggestion" that the union had an "exclusive" right to sue. *Id.* at 621. The Sixth Circuit's holding that the workers could sue over wage claims was evident from a series of cases interpreting both the Act and the subsequently enacted Section 301 of the Labor Management Relations Act (29 U.S.C. § 185). These cases indicate that Congress did not intend to preclude all worker lawsuits arising from the mandatory bargaining issues. *See Office & Pro'f Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 66 (D.C. Cir. 1992) (R. Ginsburg, J.) ("When a claim derives from a collective bargaining agreement – an arrangement negotiated by a union to which it is a signatory – the labor organization is an appropriate (although not the *only* appropriate party) to vindicate employees' rights.") (emphasis added). *Trollinger*, 370 F.3d at 621. Hence, the union was not the "exclusive" party to bring a claim for relief arising from other statutory rights not contemplated by Congress in enacting the Act. The case for wage depression was such an area not foreclosed by the Act.[9] *Id.* Thus, *Baker's* comment

[9] The principle involved is basic: One statutory right is not to be denigrated by another unless Congress expressly or implicitly so intends. *See, e.g., F.C.C. v. NextWave Personal Communications Inc.,*

(Continued on following page)

("Individual workers may step into the union's shoes only if it has violated its duty of fair representation," *Baker*, 357 F.3d at 609) is wrong. *Trollinger*, 370 F.3d at 621 ("The historical context in which these statutes were enacted . . . suggests that when Congress made unions the exclusive representative of employees for purposes of collective bargaining, it did not mean to establish unions as the exclusive representative of employees for purposes of *all* wage-related litigation.") (emphasis added).

---

537 U.S. 293, 304 (2003) ("When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"). Since Congress expressly enacted RICO to co-exist with other criminal and civil statutes, it would be contrary to Congress' intent to have a statute enacted *before* RICO to displace it except in the most clearly required situations, which the issues in this Petition do not represent. Pub. L. No. 91-452, § 904(b), 84 Stat. 947 ("Nothing in . . . [RICO] shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided in this title."). Even in the labor law area, this Court is loath to find that other statutes are displaced. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985) ("In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under [§ 301] to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract").

II. THIS COURT SHOULD RESOLVE THE SPLITS BETWEEN THE SEVENTH CIRCUIT THAT LIMITS ENTERPRISE PLEADING TO THOSE NOT INVOLVING DIVERGENT GOALS AND (1) THE SECOND CIRCUIT THAT RECOGNIZED A SIMILAR ENTERPRISE PLEADING UNDER AN ILLEGAL IMMIGRATION SCENARIO, (2) THE SECOND CIRCUIT (AND OTHERS) THAT RECOGNIZE ENTERPRISE PLEADINGS IN THE ORGANIZED CRIME AREA, (3) OTHER CIRCUITS THAT UPHOLD ENTERPRISE PLEADINGS THAT REFLECT DIVERGENT GOALS, AND (4) THE FIRST, SECOND, AND NINTH CIRCUITS THAT RECOGNIZE ENTERPRISE PLEADINGS THAT INCLUDE FRAUD VICTIMS OF A RICO VIOLATION.

Baker is in conflict with "enterprise" decisions in other circuits in several scenarios: (1) illegal immigration, (2) organized crime, (3) governmental enterprises, and (4) commercial fraud.

(1) Illegal Immigration Litigation.

The Seventh Circuit's decision clashes with the Second Circuit in *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374, 379 (2d Cir. 2001). Commercial sued Colin under RICO for commercial injury caused by Colin's alleged illegal immigrant hiring scheme. The Second Circuit found no reason to object to an association-in-fact enterprise described, in relevant part, as:

> Colin is part of an enterprise composed of entities associated-in-fact that includes employment placement services . . . and 'various immigrant networks that assist fellow illegal immigrants in obtaining employment, housing and illegal work permits.' * * * It alleges that Colin's participation in the affairs of the enterprise through the illegal

> immigrant hiring scheme violates 8 U.S.C. § 1324(a), which prohibits hiring certain undocumented aliens, and which is a RICO predicate offense if committed for financial gain.[10]

The enterprise in *Baker* is indistinguishable from the one alleged in *Commercial Cleaning, i.e.*, the defendant and others that assist it in recruiting illegal workers.[11] The Second Circuit found only one defect in the RICO claim, a failure to plead the required state of mind in the commission of the predicate offenses.[12] Yet, as in *Baker,* defendant Colin, presumably, "want[ed] to pay lower wages; the recruiters [,that is, the employment placement services] want[ed] to be paid more for services rendered (though . . . Colin) would [have] lik[ed] to pay them less); the . . . [various immigrant networks that assisted fellow illegal immigrants] wanted to assist members of . . . [their] ethnic group[s]. These . . . [were] divergent goals." *Baker*, 357 F.3d at 691. If *Baker's* analysis is required by RICO, and it is not, *Commercial Cleaning* was wrongly decided, and it is not.[13] The split ought to be resolved by this Court now.

---

[10] 357 F.3d at 379.

[11] The *Commercial Cleaning Service, L.L.C.* enterprise contained other entities, but they are, in the words of *Baker*, "agents and employees" in the illegal scheme, which composed the enterprise, that it believed came "perilously close" to violating the holding of *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir. 2003) (citing *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226-228 (7th Cir. 1997) ("a large, reputable manufacturer . . . plus its dealers and other agents (or any subset of the members of the corporate family) do not constitute an enterprise"). The differences, therefore, are not material.

[12] *E.g.*, 371 F.3d at 387: "[That Colin had actual knowledge that the illegal aliens it hired were brought into the country in violation of the [immigration statutes]]."

[13] For that matter, *Baker's* analysis does not reflect general organizational theory. The *Baker* opinion mistakenly confuses the goals *of members* of an organization (personal goals) with the goals *of the organization* (collective goals). A leading treatise on organizations states:

(Continued on following page)

> An organizational goal is a desired state of affairs that the organization attempts to realize. * * * A goal . . . is a state that we seek, not one that we have. Such future states of affairs . . . [are] images.
>
> But whose image of the future does the organization pursue? That of the top executives? The board of directors or trustees? The majority of the members? Actually none of these. The organizational goal is that future state of affairs that the organization *as a collectivity* is trying to bring about. It is in part affected by the aims of the top executives, those of the board of directors and those of the rank and file. Sometimes it is determined through peaceful consultation, at other times it is the outcome of a power play among the various organizational divisions, plants, cabals, ranks, and 'personalities.'
>
> How then, does one determine what the goal of an organization is? In part, the participants may act as informants. We may interview . . . [them]. In interviewing them, however, we must carefully distinguish their *personal* goals from the goal of the *collectivity*. * * * [W]e can [also] analyze the division of labor of the organization, its flow of work, and its allocation of resources . . .
>
> * * *
>
> Virtually all organizations have a formal, explicitly recognized, sometimes legally specified organ for setting initial goals and for their amendment. * * * In practice, goals are often set in a complicated power play involving various individuals and groups within and outside the organization.
>
> * * *
>
> Conflict goes on continually, but at the same time, persons and groups bargain for some say in determining organization goals, though often such bargaining is implicit or 'silent' . . . The net result is that what happens to be the goals of an organization at a particular time may be seen as the features of a bargain struck among negotiators, or as the terms of a truce among combatants, the goals are always temporary, likely to be modified whenever the power balance shifts, either inside the organization or in the environment.

Edward Gross & Amitai Etzoini, ORGANIZATIONS IN SOCIETY 8-13 (1985) (citations omitted; emphasis added). If *Baker's* analysis were correct, "divergent [personal] goals" among members of a putative organization would preclude the existence of *any* organizations in society (under RICO or otherwise), since they could not have any common or collective goals. Law and organizational theory are in accord. *See United States v.*

(Continued on following page)

(2) Organized Crime.

RICO's "legislative history . . . clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime . . ." *Russello v. United States*, 464 U.S. 16, 26 (1983). Any construction of RICO that jeopardizes its core purpose cannot be correct. Yet, if *Baker*, is *uniformly* applied across association-in-fact enterprises,[14] then organized crime prosecutions are in serious jeopardy. For example, the Second Circuit in *United States v. Orena,* 32 F.3d 704, 710 (2d Cir. 1994) faced a RICO prosecution in the context of an internal war between opposing factions of the Colombo Family of the Cosa Nostra. The Second Circuit observed:

> Substantial evidence at trial established that after Colombo family boss Carmine Persico was incarcerated for a lengthy term in 1986 and a committee that was appointed to govern the Colombo Family proved unworkable, the Commission, [the top governing body of Cosa Nostra,] appointed Orena as the acting boss of the Colombo Family on Persico's recommendation. * * * In any event, there was considerable evidence that Orena thereafter aspired to become the official, rather than the acting, boss of the Colombo family, displacing Persico. Persico, in turn,

---

Griffin, 660 F.2d 996, 1000 (4th Cir. 1981) ('Critical . . . is proof of a common purpose . . . [T]he evidence sufficiently supports the . . . inference . . . that whatever the *private* purposes there may have been there was also the required *commonality* of purpose [to commit the predicate acts.].") (emphasis added).

[14] RICO's crucial concepts *are* to be uniformly applied. *See, e.g., Reves v. Ernst & Young*, 507 U.S. 170, 177-86 (1993) ("conduct" read identically in its verb and noun form in RICO); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 239 (1987) ("a 'pattern' for civil purposes is a 'pattern' for criminal purposes" under RICO) (citation omitted). *Cf. Northern Sec. Co. v. United States*, 193 U.S. 197, 401 (1904) (antitrust) (Holmes, J. dissenting) ("The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction.").

> indicated his intention to replace Orena with Persico's son, Alphonse Persico, who was scheduled for release from imprisonment in June 1993. This resulted in [violent] conflict[s] between Orena and Persico factions of the Colombo Family in 1991 and 1992 . . .

Id. at 708.

Orena challenged his RICO convictions, arguing that the enterprise allegation was "schizophrenic." *Id.* at 709. The indictment alleged:

> The members and associates of the Colombo Organized Crime Family of La Cosa Nostra ('Colombo family') constituted an 'enterprise' as that term is described in Title 18, United States Code, Sections 1961(4) . . ., that is, a group of individuals associated in fact.

Id. at 709.

The Second Circuit rejected Orena's arguments. "The existence of an internal dispute does not signal the end of the enterprise . . . " *Id.* at 710 (citing *United States v. Coonan*, 938 F.2d 1553, 1560-61 (2d Cir. 1991) (violent infighting in "Westies," an Irish gang, did not negate existence of RICO enterprise)). The Circuit also turned to basic conspiracy law. 32 F.3d at 710 (citing *United States v. Amato*, 15 F.3d 230, 234 (2d Cir. 1994) ("Rivalry and dissension . . . do not necessarily signify dissolution of a conspiracy.").

The conflict between *Baker* and organized crime prosecutions is not limited to association-in-fact enterprises that reflect internal disputes (an attribute that might well be generalized to all such organizations – or, for that matter, to all organizations – under RICO – or otherwise.). The Seventh Circuit also believed that the person, IBP, was not "distinct" from the enterprise, IBP and its recruiters. Under the person-enterprise rule, a distinction must exist between the "person" and the "enterprise." If no distinction can be drawn, the two concepts collapse, and the pleading is improper for a failure to plead distinct entities. The Seventh Circuit holds

that no distinctness is present between a corporation and its subsidiaries and employees. *See, e.g., Bachman v. Bear Stearns & Co., Inc.*, 178 F.3d 930, 932 (7th Cir. 1999) ("A firm and its employees, or a parent and its subsidiaries, are not an enterprise separate from the firm itself"). Thus, the *Baker* court perceived the enterprise alleged here as such a family of corporations under common ownership. *Baker*, 357 F.3d at 691 (citing *Bucklew*, 329 F.3d at 934 (citing *Fitzgerald*, 116 F.3d at 226-28) ("a large, reputable manufacturer . . . plus its dealers [, independently owned or otherwise,] and other agents (or any subset of the members of the corporate family) do not constitute an enterprise")). But in any conspiracy, its members are bound by the common purpose of the conspiracy. This makes the conspirators "partners" of each other.[15] If the Seventh Circuit's analysis were correct, then no association-in-fact enterprise could ever exist, because they would all be swallowed up by the "distinctness" requirement. Hence, *Baker* is in conflict with the legion of organized crime prosecutions from other circuits where the association-in-fact enterprise was an organized crime family, having divergent, personal goals, though the collectivity is held together by a common purpose. Mob prosecutions have been brought in the First,[16] Second,[17] Third,[18] Sixth,[19]

---

[15] *Salinas v. United States*, 522 U.S. 52, 633-66 (1997) (RICO conspiracy is to be evaluated under traditional standards; "The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other").

[16] *See, e.g., United States v. Barone*, 114 F.3d 1284, 1288 (1st Cir. 1997).

[17] *See, e.g., United States v. Salerno*, 868 F.2d 524, 528 (2d Cir. 1989).

[18] *See, e.g., United States v. Riccobene*, 709 F.2d 214, 222-24 (3rd Cir. 1983).

[19] *See, e.g., United States v. Tocco*, 306 F.3d 279, 283-84 (6th Cir. 2002).

and Ninth[20] Circuits, which are now in conflict with *Baker*, *and would be subject to dismissal if Baker is correct.*

"Organized crime" is not limited to the activities of Cosa Nostra. In *United States v. Elliot*, 571 F.2d 880, 884 (5th Cir. 1978), the Fifth Circuit was faced with "Dixie Mafia," a group of ethnically southern whites. The core of the RICO conspiracy charge was that the defendants agreed to participate in the conduct of the affairs of an "enterprise" whose purposes were to commit thefts, fence stolen property, illegally traffic in narcotics, obstruct justice, and engage in "other criminal activities." The Circuit Court observed:

> This enterprise can best be analogized to a large business conglomerate. Metaphorically speaking, J. C. Hawkins was the chairman of the board, functioning as the chief executive officer . . . An executive committee in charge of the "Counterfeit Title, Stolen Car, and Amphetamine Sales Department" was comprised of J. C. Delph, and Taylor, who supervised the operations of lower level employees such as Farr, the printer, and Green, Boyd, and Jackson, the car thieves. Another executive committee, comprised of J. C. Recea and Foster, controlled the "Thefts from Interstate Commerce Department", arranging the purchase, concealment, and distribution of such commodities as meat, dairy products, "Career Club" shirts, and heavy construction equipment. An offshoot of this department handled subsidiary activities, such as murder and obstruction of justice. . . . Each member of the conglomerate, with the exception of Foster, was responsible for procuring and wholesaling whatever narcotics could be obtained. The thread

---

[20] *See, e.g., United States v. Brooklier*, 685 F.2d 1208, 1213 (9th Cir. 1982).

> tying all of these departments, activities, and individuals together was the desire to make money.

Elliot, 571 F.2d at 898.

Elliot's analysis of the common objective requirement of "enterprise" within RICO (and of conspiracy) is in conflict with *Baker*. If RICO is to remain effective against organized crime-type activities, as in *Elliot*, this split must be now resolved.

One other type of RICO association-in-fact enterprise prosecution merits attention. Organized criminal groups often invade legitimate organizations; they then use them as "fronts" or "instruments" for patterns of criminal behavior. Two types of prosecutions illustrate this scenario: often the group itself is the enterprise, but just as often, the infiltrated organization is the enterprise. In the first, the issues are the same as those already discussed. *See, e.g., United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995) (prosecution of the Jerry Lewis Organization (JLO), a violent (murder) drug enterprise, that used as a front the Subordinate Temple No. 1 of the Moorish Science Temple of America, a religion founded in 1913 by an African-American in Newark, New Jersey, as an alternative to white Christianity.). In the second, the split presented in this Petition is aptly illustrated. In *United States v. Beasley*, 72 F.3d 1518 (11th Cir. 1996), the Eleventh Circuit faced the prosecution under RICO for a pattern of murder, extortion, and arson in connection with a religious cult founded in 1979, known as "Yahwehs" or "Black Hebrew Israelites." Hulan Mitchell, or Yahweh ben Yahweh, lead the cult. He established Temples in metropolitan areas in the United States, including the Temple of Love in Miami, Florida. He also created an ultra secret group within the cult called the "Brotherhood"; to become a member of the Brotherhood required killing a white person. Numerous issues were raised on appeal, including the propriety of naming as an enterprise "a group known as the Yahwehs, . . . and the Temple of Love, Inc." Brief of Richard Ingraham, *United States v. Beasley*, 1994 WL

16136346 *19 (11th Cir.). The Circuit upheld the enterprise formulation. *Beasley*, 72 F.3d at 1525. The Circuit found that not all members of the Temple "supported or were engaged in the homicidal activities . . . " *Id.* at 1526 n.7. It observed:

> [T]here is a distinction between the conspirators . . . and the general population of the Temple. * * * This case is not the prosecution of a religion. The religion had adherents who never became involved in illegal activity . . . *Id.*

Here, too, the Circuit faced a divergence between the common goal of the enterprise (religion) and the personal or private goals of the conspirators (a pattern of racketeering activity, including murder, extortion, and arson). Nevertheless, the Circuit, in sharp contrast to *Baker*, but fully consistent with *Griffin*, 600 F.2d at 1000, n.12, *supra*, had no difficulty in properly upholding the convictions.

If the *Baker* decision is allowed to stand, then many criminal RICO cases will be vulnerable to motions to dismiss. Most RICO prosecutions allege association-in-fact enterprises, and any competent defense counsel will cite *Baker*'s "divergent goals" holding. District judges that follow *Baker* will have no alternative but to dismiss indictments.

(3) Governmental and Other Enterprises Reflecting Divergent Goals.

RICO's definition of "enterprise" is expressly "inclu[sive]." 18 U.S.C. § 1961(1)(4). It is held to encompass "a wide range of legitimate enterprises, . . . including unions . . . , courts [, and] police departments . . . " *Beasley*, 72 F.2d at 1525.[21] No one ought seriously to argue that unions, in carrying out their ordinary activities of collective

---

[21] A union, *United States v. Norton*, 867 F.2d 1354, 1359 (11th Cir. 1989), a court, *United States v. Angelilli*, 660 F.2d 23, 30-34 (2d Cir. 1981), and a police department may be an enterprise. *United States v. Alonso*, 740 F.2d 862, 870 (11th Cir. 1984).

bargaining, strikes and boycotts, or courts (most of all courts, considering their universal practice of filing dissents), or police departments (as well as a wide variety of other governmental and private organizations) are characterized by a unity of *personal* or *private* goals. Thus, *Baker's* confusion between *personal* or *private* goals (which are inherently divergent in many organizations) and *collective* or *common* goals (which coalesce in the organization) must be seen as inconsistent with the statute's recognition of association-in-fact enterprises, and a mistake sharply at odds with the jurisprudence of the other circuits.

(4) Commercial Fraud Litigation.

The Circuit Courts of Appeal are unanimous in holding that an association-in-fact enterprise can include the *victim* of the RICO violation. *Aetna Casualty & Surety Co. v. P. & G. Auto Body*, 43 F.3d 1546, 1557 (1st Cir. 1994) (upholding judgments for insurance fraud; "Under § 1961 an enterprise may include a legitimate legal entity like Aetna as the victim of the racketeering activity."); *Jacobson v. Cooper*, 882 F.2d 717, 720 (2d Cir. 1989) (reversing dismissal of complaint for failure to plead proper enterprise in real estate fraud; "Jacobson at some point voluntarily associated himself with one or both of the defendants to constitute a legitimate enterprise before his participation was foreclosed by the criminal activities of the defendants. . . . Under this reading of the amended complaint, the defendants named in this action would be but members of a larger enterprise that included Jacobson."); *United Energy Owners Committee., Inc. v. United States Energy Management Systems*, 837 F.2d 356, 362-64 (9th Cir. 1988) (reversing dismissal of complaint for failure to plead proper enterprise in fraudulent solar energy tax shelter scheme; "[T]he plaintiffs are free to allege that they or one of their members is a RICO enterprise or part of a RICO enterprise . . . RICO § 1962(c) requires proof of '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.' . . . This language does not prohibit

the plaintiffs from including themselves in a legitimate, albeit infiltrated, enterprise and has not been interpreted to limit RICO enterprises to those persons engaged in the illegal conduct. . . . What is important is that the plaintiffs must allege that 'the *defendants conducted* the enterprise through a pattern of racketeering activity.' . . . The plaintiffs have done so in this case.") (emphasis in original; citations omitted). Here, too, *Baker's* confusion between *personal or private* goals and *collective* or common goals is starkly seen.

III. SINCE ILLEGAL IMMIGRATION IMPOSES POLITICAL, ECONOMIC AND TAX, HEALTH, WELFARE, AND EDUCATION, CORRECTIONS, AND LAW ENFORCEMENT COSTS ON THE NATION, THIS COURT SHOULD REVIEW THIS PETITION NOW BECAUSE OF ITS NATIONAL IMPORTANCE AND TURN BACK EFFORTS TO UNDERMINE THE PRIVATE ENFORCEMENT MECHANISM ENERGIZED BY CONGRESS IN 1996 THAT IS A NECESSARY SUPPLEMENT TO LAW ENFORCEMENT

Illegal immigration imposes important political, economic and tax, health, welfare, and education, corrections, and law enforcement costs on the nation. Congress in 1996 added immigration predicates to RICO to aid law enforcement by energizing the enforcement of provisions of the immigration statutes by the use of private attorneys general. The Second, Sixth, and Ninth Circuits[22] have handed down decisions that faithfully follow the law as written by Congress. The Seventh Circuit's decision threatens this favorable development in the law and settled RICO jurisprudence.

---

[22] *Mendoza v. Zirkle Fruit Co.*, 310 F.3d 1163 (9th Cir. 2002).

(1) Political Impact.

The impact of illegal immigration affects the political processes of the nation at the highest levels. The population of the United States is approaching 300 million.[23] The fastest growing and largest minority is Hispanic.[24] The Hispanic population is now 39.9 million.[25] This year, the illegal immigration population will rise to 8.5 million persons, a net increase each year of 500,000.[26] Mexico is the largest source for unauthorized immigration; that number is now over five million; its percentage of the unauthorized population is over 70%.[27] California, Arizona,

---

[23] *See* Press Release, U.S. Census Bureau, Hispanic and Asian Americans Increasing Faster Than Overall Population (June 14, 2004), available at http//:www.census.gov/PressRelease/www/releases/achives/race/001839.html; U.S. Census Bureau, Population Estimates, Annual Estimates of the Population By Sex, Race and Hispanic Origin for the United States: April 1, 2000 to July 1, 2003 (2004), available at http://eire.census.gov/popest/data/national/tables/NC-EST2003-03.pdf; U.S. Census Bureau, Population Estimates, Annual Estimates of the Components of Population Change By Race and Hispanic or Latino Origin for the United States: July 1, 2002 to July 1, 2003 (2004), available at http://eire.census.gov/popest/data/national/tables/NC-EST2003-06.pdf; *See also*, *2 Minorities Spur Rapid U.S. Growth*, N.Y. TIMES, June 15, 2004, col. 1, at A14.

[24] Press Release, U.S. Census Bureau, Hispanic and Asian Americans Increasing Faster Than Overall Population (June 14, 2004), available at http//:www.census.gov/PressRelease/www/releases/archives/race/001839.html.

[25] *Id.*

[26] *See* U.S. Census Bureau, U.S. Dept of Commerce, ESCAP II: Demographic Analysis Results (2001), available at http://www.census.gov/dmd/www/pdf/Report1.PDF; Center for Immigration Studies, *Current Numbers,* available at http://www.cis.org/topics/currentnumbers.html ("Net increase" represents all new illegal immigration minus deaths, legalizations, and out-migration of illegal immigrants.).

[27] U.S. Immigration and Naturalization Service, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* 1 (January 2003), available at http://uscis.gov/graphics/shared/aboutus/statistics/Ill_Report_1211.pdf. The current growth rate of the Hispanic population is 13 percent, almost four times that of the total population. With an illegal Mexican population growth of at least

(Continued on following page)

and Texas are the three states with the highest illegal immigrant populations.[28] In fact, more than 8% of California's population is composed of illegal immigrants.[29] Arizona and Texas each follow with approximately 7% and 6%, respectively. Politically, the presence of illegal aliens is important; its presence causes individual states to lose seats in the House of Representatives; it also poses the threat of affecting presidential elections by altering the character of the Electoral College. U.S. Const. art. I, § 2; art. II, § 1. Indiana, Michigan, and Mississippi each lost one seat in 2000; Montana failed to gain a seat that it would have had.[30] In all, nine seats relocated; Oklahoma, Pennsylvania, Wisconsin, Kentucky, and Utah had one fewer seat than they would have had but for illegal immigration. California picked up six seats; New York, Texas, and Florida gained the other three seats.[31] Thus, the failure to curb illegal immigration distorts the processes of government by significantly depriving citizens of the weighted character of their votes in the House of Representatives and in the Electoral College. All that can legally be done ought to be done to curb it.

(2) Economic and Tax Impact.

Illegal immigration imposes important economic and fiscal impacts. Two issues bring immigrants to the United

---

7 percent (twice that of the overall United States population growth) these figures would make illegal Mexicans responsible for 5.6% of the overall population growth in the nation. *See* Press Release, U.S. Census Bureau, Hispanic and Asian Americans Increasing Faster Than Overall Population, *supra* note 1 (stating that the total population growth is 3.3 percent).

[28] *Id.*

[29] *Id.*

[30] Dudley L. Poston, et al., Center for Immigration Studies, *Remaking the Political Landscape: The Impact of Legal and Illegal Immigration on Congressional Reapportionment* 3 (October 2003), available at http://www.cis.org/articles/2003/back1403.pdf.

[31] *Id.*

States: family and jobs. Two thirds of legal immigrants are admitted not because of needed skills, but because of familial relations.[32] Most illegal aliens are here seeking work. *If they could not find it, they would not come.* Immigrants (legal and illegal) increase the labor supply in low-level jobs.[33] They concentrate in large population areas: New York, Los Angeles, and Chicago, which account for 34.5% of the immigrant population.[34] Nevertheless, the huge volume of goods and services exchanged between cities across the country creates pressure toward the equalization of the price of labor.[35] Significantly, 75% of illegal aliens lack a high school degree.[36] In 1997, the National Research Council concluded that immigration (legal and illegal) had a significant negative impact on the wages of high school dropouts: the income of those who lack a high school degree, 11 million of which are natives, was reduced by up to $13 billion a year.[37] That figure is roughly equal to combined federal expenditure on subsidized school lunches, low-income energy assistance, and the Women, Infants, and Children Program.[38] In fact, the influx of immigration affected wages on the top as well as

---

[32] U.S. Immigration & Naturalization Service, U.S. Dep't of Justice, The Triennial Comprehensive Report on Immigration 12 (2002), available at http://uscis.gov/graphics/aboutus/repsstudies/tri3.pdf (last modified October 31, 2003).

[33] Steven A. Camarota, Center for Immigration Studies, *The Impact of Immigration on American Workers: Testimony Prepared for the House Judiciary Committee Subcommittee on Immigration and Claims* 1 (October 28, 2003), available at http://www.house.gov/judiciary/camarota103003.htm.

[34] George J. Borjas, *Increasing the Supply of Labor Through Immigration: Measuring the Impact on Native-born Workers* 2 (May 2004), available at http://www.cis.org/articles/2004/back504.pdf.

[35] *Id.*

[36] Camarota, *supra* n.38, at 11.

[37] NATIONAL RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 7 (James P. Smith & Barry Edmonston, eds., 1997).

[38] *Id.*

the bottom: in 2000, the typical native man without a high school diploma earned $25,000; his reduction in wages was $1,800; the typical male college graduate earned $73,000; his wages were reduced by approximately $2,600.[39] Not only are wages lost, taxes are higher. The National Research Council also estimated in 2003 that for immigrant households the fiscal cost – tax payments minus service use – could be as high as $22 billion.[40] If approximately 27% is illegal, this could place the illegal burden at $5.9 billion. Moreover, surveys indicate up to one-half of employers do not even deduct taxes from the pay of illegal workers.[41] Typically, illegal aliens receive a tax-free wage that is around 20-30% lower than the going wage in a given occupation; thus employers gain excess profits of at least 17% of the illegal alien's wage.[42] Accordingly, the economic and fiscal impact of illegal immigration is substantial. All that can legally be done ought to be done to curb it.

(3) Health, Welfare, and Education.

The health, welfare, and educational costs of illegal immigrant populations are an important and growing part of public expenditures. Less than half of employed illegal

---

[39] Borjas, *supra* n.39, at 8. These national data put into unfavorable contrast the judicial skepticism on the damage in *Baker,* 357 F.3d at 691. Only the *fact* of damage must not be speculative; the *extent* of damages may be shown under a more relaxed standard, since a defendant must be able to profit from the "uncertainty" created by his own wrongful conduct. *J. Truett Payne & Co. v. Chrysler Motor Corp.,* 451 U.S. 557, 566 (1981) (antitrust). *Compare DeCanas v. Bica,* 424 U.S. 351, 356-57 (1976) ("illegal aliens [taking] substandard . . . wages . . . can seriously depress wage scales . . . [for] citizens and legally admitted aliens").

[40] *See* Center for Immigration Studies, *Costs,* at http://www.cis.org/topics/costs.html.

[41] Donald L. Huddle, *Immigration and Jobs: The Process of Displacement* (May 1995), at http://www.npg.org/forum_series/imm&jobs.htm.

[42] *Id.*

aliens are covered by medical insurance or worker's compensation plans.[43] If they are injured, they are replaced, not treated, and they usually do not even receive their last paycheck.[44] Medicaid, however, provides health care coverage for everyone, including illegal aliens, in emergency care facilities.[45] In a study of ten states, more than $2 billion was spent in 2002 for emergency Medicaid expenditures, though not divided by native born.[46] Nevertheless, five of the ten states studied reported data that points to the likelihood that at least half of the emergency expenditures were for illegal aliens for labor services for pregnant women.[47] The Balanced Budget Act of 1997 also made money available annually for distribution to states with the highest number of illegal aliens; in six states, the money was entirely used to reimburse moneys already spent on undocumented aliens for emergency care services.[48] Indeed, during the debates on the 1995 Act, Congressman Solomon told the House that then Governor Wilson of California reported to him that two-thirds of the babies born in Los Angeles hospitals are born to parents who have illegally entered the United States. 141 Cong. Rec. H1586 (1995) (statement of Rep. Solomon). In addition, in fiscal year 1995, approximately $1.1 billion in Aid to Families with Dependent Children (AFDC) and food stamps were provided to households with an illegal alien parent.[49] Eighty-five percent of these AFDC households

---

[43] Huddle, *supra* n.46.

[44] *Id.*

[45] U.S. Gen. Accounting Office, GAO-04-472, Report to Congressional Requesters, Undocumented Aliens: Questions Persist About Their Impact On Hospitals' Uncompensated Care Costs 9 (May 2004).

[46] *Id.* at 10.

[47] *Id.*

[48] *Id.* at 14.

[49] U.S. Gen. Accounting Office, GAO/HEHS-98-30, Report to Congressional Committees, Illegal Aliens: Extent of Welfare Benefits Received on Behalf of the U.S. Citizen Children 6 (November 1998).

were in California, New York, Texas, and Arizona.[50] Any child, regardless of immigration status, is also properly eligible for free primary and secondary education under *Plyler v. Doe,* 457 U.S. 202 (1982). As of 2000, immigrants (legal and illegal) made up 20% of the 55 million students in K-12. Approximately 1.1 million school-aged illegal immigrants reside in the United States.[51] The cost of admitting these illegal immigrants to primary and secondary schools in the United States is about $7.6 billion.[52] Thus, the health, welfare, and educational costs of illegal immigrant populations are an important and growing part of public expenditures.

(4) Corrections.

Immigration (legal and illegal) imposes important costs on the corrections systems of the United States. During the 1990's, the federal prison population more than doubled.[53] According to the Bureau of Prisons, the cost of incarcerating an inmate in 2002 was $22,517 in prison and $17,706 for a community correction center.[54] More than 25% of the federal prison population is aliens.[55] In 2002, criminal aliens cost the Federal Corrections budget $891

---

[50] *Id.* at 8.

[51] *See* U. S. Census Bureau, Current Population Survey 2000, available at http://www.census.gov/apsd/techdoc/cps/cpsoct00.pdf; *see also*, Michael E. Fix & Jeffrey S. Passel, U.S. IMMIGRATION: TRENDS AND IMPLICATIONS FOR SCHOOLS 16 (Urban Institute 2003), available at http://www.urban.org/UploadedPDF/410654_NABEPresentation.pdf.

[52] According to the U.S. Department of Education, in 1999-2000 the average cost per student for the United States was $6,911. U.S. Dep't of Education, National Center for Educational Statistics, Current Expenditures Per Pupil In Fall Enrollment In Public Elementary And Secondary Schools By State: 1969-70 to 1999-2000, available at http://nces.ed.gov/programs/digest/d02/tables/PDF/table169.pdf.

[53] U.S. Dep't of Justice, Federal Bureau of Prisons, *at* http://www.bop.gov/ipapg/ipaabout.pdf.

[54] *Id.* at http://www.bop.gov/progstat/om015_03.pdf.

[55] *Id.* at http://www.bop.gov/fact0598.html.

million.[56] Nevertheless, less than 8% of the country's prison population is in federal prisons.[57] The Urban Institute's 1994 study estimated, however, that 21,395 illegal aliens were incarcerated in California, New York, Florida, Texas, Illinois, New Jersey, and Arizona.[58] California bore a cost of $368 million to incarcerate approximately 15,000 illegal aliens.[59] According to Congressman Foley, Florida on any given day had approximately 5,504 criminal aliens in state corrections facilities, annually costing taxpayers an average of more than $14,000 per inmate. 114 Cong. Rec. H1595 (1995) (statement of Rep. Foley). In all, Congressman Packard reported to the House during the 1995 debates that criminal aliens cost the state and county criminal justice systems more than $500 million per year, costs, he thought, "[w]e cannot sustain." 114 Cong. Rec. 1590 (1995) (statement of Rep. Packard).

(5) Law Enforcement.

Lawful and unlawful immigration is largely out of the control of the Immigration and Nationalization Service (INS).[60] One measure of those phenomena is the experience

---

[56] U.S. Dep't of Justice, Bureau of Justice Statistics, available at http://www.ojp.usdoj.gov/bjs/.

[57] *Id.*

[58] Rebecca L. Clark et al., FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES 8-13 (Urban Institute 1994).

[59] *Id.*; U.S. Gen. Accounting Office, GAO/HEHS-95-22, Report to the Honorable Barbara Boxer, U.S. Senate, Illegal Aliens: Assessing Estimates of Financial Burden on California 6 (November 1994). Arizona, California, Florida, New Jersey, New York, and Texas (6 of the 7 states with the largest illegal alien populations) have each filed suits to force the federal government to reimburse them for criminal justice costs associated with undocumented aliens. Rebecca L. Clark & Scott A. Anderson, ILLEGAL ALIENS IN FEDERAL STATE AND LOCAL CRIMINAL JUSTICE SYSTEMS ii (Urban Institute 2000), available at http://www.urban.org/UploadedPDF/410366_alien_justice_sum.pdf.

[60] As of March 1, 2003, the INS was transferred to the Department of Homeland Security. *See* Homeland Security Act of 2002, § 441, 116

(Continued on following page)

of the Department of Justice following September 11th. The Department sought to interview 4,112 aliens who might have the ability to help the Department with its anti-terrorism programs. By February 2002, 45% of these aliens could not be located because the INS lacked reliable address information.[61] Similarly, and just as disturbingly, in January 2002, the Department established the Absconder Apprehension Initiative; it examined an estimated 314,000 aliens with final orders of removal. The INS then identified 5,046 who were from countries in which Al Qaeda terrorists had a presence. As of June 24, 2002, neither the INS nor the Federal Bureau of Investigation (FBI) was able to locate 86% of the absconders.[62] The Immigration Reform and Control Act of 1986, 100 Stat. 3359 (1986) (IRCA) made it illegal for an employer to hire an illegal alien. Unfortunately, the Act is easily circumvented. Data from the INS's database showed that over a 20-month period (October 1996 – May 1998), the INS identified about 50,000 unauthorized aliens who had used 78,000 fraudulent documents to obtain employment.[63] The INS, too, has too many responsibilities. Since 1994, it has devoted only 2% of its enforcement resources to worksite enforcement, *and this was before 9/11*.[64] The results of the investigations are as might be expected. In fiscal year 1998, for example, the INS completed about 6,500 employer investigations of about 3% of the country's estimated

---

Stat. 2192 (2003) (6 U.S.C. § 251) (Supp. 2003)). For convenience, the older usage is employed here. The Department is still overwhelmed with work, *see* Nina Bernstein, *A Longer Wait for Citizenship and the Ballot*, N.Y. TIMES, June 11, 2004, col. 5, at 1 (reporting a backlog of 100,000 petitions for citizenship in New York City).

[61] U.S. Gen. Accounting Office, GAO-03-188, Report to Congressional Requesters, Homeland Security: INS Cannot Locate Many Aliens Because It Lacks Reliable Address Information 3 (November 2002).

[62] *Id.* at 13.

[63] U.S. Gen. Accounting Office, GAO/GGD-99-33, Report to Congressional Committees, Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist 10 (April 1999).

[64] *Id.* at 3.

number of employers of illegal aliens.[65] Eighty-three percent of the investigations resulted in no employer sanctions.[66] The INS instituted criminal proceedings in only 2% of the investigations.[67] The widespread use of fraudulent documentation makes it difficult to prove the required knowledge beyond a reasonable doubt on the part of the offending employers.[68] In fact, the INS was only able to collect one-half of the criminal penalties it assessed, principally because of employer bankruptcy.[69] In short, the government alone through the INS, even supplemented by the FBI, cannot do the job of curtailing illegal immigration, much less meet its increased responsibilities since 9/11.

(6) Private Enforcement.

In 1970, Congress enacted RICO to deal with "enterprise criminality."[70] Like the antitrust statutes, Congress used in RICO "a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 359-60 (1933) (antitrust). Congress "drafted

---

[65] *Id.*

[66] *Id.*

[67] U.S. Gen. Accounting Office, GAO/T-GGD-99-105, Statement to Chairman and Members of the Subcommittee, Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment 5 (1999).

[68] U.S. Gen. Accounting Office, GAO/T-GGD/HEHS-99-175, Testimony Before the Subcommittee on Immigration and Claims Committee on the Judiciary, House of Representatives, Illegal Aliens: Fraudulent Documents Undermining the Effectiveness of the Employment Verification System (July 1999).

[69] Statement to Chairman and Members of the Subcommittee, Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist, *supra* n.72, at 5.

[70] *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) ("enterprise criminality" consists of "all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors.") (citations omitted), *cert. denied*, 465 U.S. 1005 (1984).

RICO broadly enough to encompass a wide range of criminal activity, taking many different forms, and likely to attract a broad array of perpetrators operating in many different ways." *H.J. Inc.*,492 U.S. at 248-49. "The occasion for Congress' action was the perceived need to combat organized crime. But Congress, for cogent reasons, chose to enact a more general statute. . . . " *NOW, Inc.*, 510 U.S. at 260 (citation omitted). Like the antitrust laws, RICO creates "a private enforcement mechanism that . . . deters violators[;] deprives them of the fruits of their illegal actions and . . . provide[s] ample compensation to the victims of [RICO] violations." *Blue Shield of VA. v. McCready*, 457 U.S. 465, 472 (1982) (antitrust) (citing *Pfizer, Inc. v. India*, 434 U.S. 308, 313-14 (1978)); *Rotella v. Wood*, 528 U.S. 549, 558 (2000) ("'private attorneys general' dedicated to eliminating racketeering activity. * * * The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering. . . . "). Congress wanted private citizens to use the law to obtain the relief that the Justice Department and the INS, given their limited resources, cannot be expected to provide. *See Agency Holding Corp. v. Malley-Duff & Assc.*, 483 U.S. 143, 151 (1987) ("Both . . . [RICO and the anti-trust statutes] bring to bear the pressure of private attorneys general on a serious national problem for which public prosecutorial resources are deemed inadequate . . . "). Moreover, like the antitrust statutes, "RICO is to be read broadly." *Sedima, S.P.R.L. v. Imrex, Co.*, 473 U.S. 479, 497-98 (1985); *American Society of Mechanical Engineers, Inc.*, 456 U.S. at 568-69 (1982) (antitrust). Indeed, RICO makes its principle of liberal construction a matter of *express* statutory language. 84 Stat. 947 (1970).

The significance of this Petition to effective administration of the federal immigration statutes and RICO can hardly be overstated. Conflicts on these key issues of "exclusive" representation and "common goals" in association-in-fact enterprises ought not to be permitted to continue. To permit these issues to fester is not fair to workers seeking fair treatment in different circuits, and it undermines RICO's effectiveness, criminally and civilly,

for example, as a guarantor of general integrity[71] of the country's national marketplace. Indeed, RICO is the *only* statute that permits private citizens to sue to enforce the immigration statutes.

If the immigration statutes are to be undermined, or RICO is to be significantly limited, as attempted here by the Seventh Circuit, that reform ought to come, if at all, from Congress itself. *H.J. Inc.*, 492 U.S. at 249. Congress has deliberately enlarged RICO's scope to bring the private enforcement mechanism to bear on the general issue of illegal aliens in the workplace, an enlargement that took place in the teeth of complaints of the misuse of RICO in the commercial fraud area. That ought to end the matter judicially, absent constitutional considerations not implicated here. *United States v. Turkette*, 452 U.S. 576, 587 (1981) ("There is no argument that Congress acted beyond its power. . . . That being the case, the courts are without authority to restrict the application of . . . [RICO]"). Justice Cardozo put it well: "[A court's] duty is done when . . . [it] enforce[s] the law as it is written." *Techt v. Hughes*, 229 N.Y. 222, 228-29, 128 N.E. 185, 186 (1920), *cert. denied*, 254 U.S. 643 (1920); *T.V.A. v. Hill*, 437 U.S. 153, 194-95 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto").

---

[71] "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power" Carl Kaysen et al., ANTITRUST POLICY 17 (1959). Antitrust focuses on the third; "scheme to defraud" focus on the second; RICO focuses on the first and second. Together, they seek a marketplace characterized by integrity, fiscal and physical. Indeed, the litany of major company names in the news for illegal conduct is dizzying. *See, e.g., The Economist*, June 28, 2003 (Enron, WorldCom, Tyco, Adelphia, HealthSouth, Imcone, Global Crossing, etc.) ("[T]he basic task is to insure that existing laws are vigorously enforced and that any loopholes in them are closed. . . . ").

CONCLUSION

For these reasons, Petitioners respectfully urge this Court to grant their Petition for a Writ of Certiorari and to *resolve these conflicts* between the circuits on exclusive representation and common goals.

G. ROBERT BLAKEY
Counsel of Record
NOTRE DAME LAW SCHOOL
Notre Dame, IN 46556-0780
(219) 631-5717 (telephone)
(219) 631-4197 (facsimile)

HOWARD W. FOSTER
JOHNSON & BELL, LTD.
55 East Monroe Street
Suite 4100
Chicago, IL 60603
(312) 372-0770

Attorneys for Petitioners

357 F.3d 685

United States Court of Appeals, Seventh Circuit.

Deborah BAKER and Richard Enyeart,
Plaintiffs-Appellants, Cross-Appellees, v. *IBP, INC.*,
Defendant-Appellee, Cross-Appellant.

No. 02-3967, 02-4065.

Argued May 30, 2003. Decided Feb. 4, 2004.

Howard William Foster (argued), Johnson & Bell, Chicago, IL, for Plaintiffs-Appellants.

David B. Johnson (argued), Eric S. Mattson and Emily A. Mily, Sidley, Austin, Brown & Wood, Chicago, IL, for Defendant-Appellee.

Before FLAUM, Chief Judge, and EASTERBROOK and RIPPLE, Circuit Judges.

EASTERBROOK, Circuit Judge.

Plaintiffs want to represent all persons, authorized to work in the United States, who have been or are now employed at IBP's meat-processing plant in Joslin, Illinois. They appeal from the district court's decision that their claim should have been submitted to the National Labor Relations Board rather than a court. Despite Fed.R.Civ.P. 23(c)(1) ("As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained"), the district judge dismissed the suit without mentioning the class aspects of the complaint. The two plaintiffs, as ex-employees at Joslin, likely are poor representatives of its current employees – not just because plaintiffs quit, but because the plant's workers already have a representative: a union certified by the NLRB. The claim in this case is

that IBP's wages are too low, and that sort of contention must be presented by the union rather than individual members of the labor force. Plaintiffs' request to proceed on behalf of a class of all workers shows that they seek to usurp the union's role. But we are getting ahead of ourselves.

Plaintiffs' complaint alleges, and we must assume given the case's posture, that about half of the employees at IBP's Joslin plant are aliens who cannot lawfully work in the United States – and that IBP not only knows in a statistical sense that many of its non-citizen employees lack the sort of visas that authorize working here but also can identify which ones they are, yet winks at obviously fake green cards and other spurious credentials. IBP alerts its unauthorized employees to stay away the days when immigration officials conduct inspections. (The complaint leaves it to the imagination how IBP learns these dates.) When immigration officials do manage to catch and remove aliens not allowed to work (or be) in the United States, IBP pays "recruiters" to smuggle them back into the country and immediately re-employs them under new aliases and new bogus identification. Moreover, the complaint alleges, IBP has arrangements with immigrant-welfare organizations, such as the Chinese Mutual Aid Association based in Chicago, under which these groups refer known illegals to IBP for employment. The upshot, plaintiffs believe, is that wages at the Joslin plant are depressed by about $4 per hour compared with what IBP would have to pay if the labor force included only U.S. citizens plus aliens holding green cards.

If the allegations are true, managers at IBP have committed hundreds of felonies. We have no idea whether any of the plaintiffs' allegations is accurate, though we do

know that the United States has not commenced a criminal prosecution. Still, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, permits private actions for three times the loss caused by a pattern of racketeering activity. See 18 U.S.C. § 1964(c). Since 1996, RICO has included among its predicate offenses "any act which is indictable under the Immigration and Nationality Act, section 274 [8 U.S.C. § 1324] (relating to bringing in and harboring certain aliens) . . . if the act indictable under such section of such Act was committed for the purpose of financial gain". 18 U.S.C. § 1961(1)(F). Plaintiffs contend that, for financial gain (a reduction in the wages it must pay), IBP brings in and employs illegal aliens, violating 8 U.S.C. § 1324(a)(3)(A) and thus, derivatively, RICO. (Section 274(a)(3)(A) makes it a crime to hire more than 10 persons in any 12-month period "with actual knowledge that the individuals are aliens described in subparagraph (B)". Subparagraph (B) reads: "An alien described in this subparagraph is an alien who (i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and (ii) has been brought into the United States in violation of this subsection.")

Two courts of appeals have held that similar allegations present claims that must be resolved on the merits. See *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir.2001); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir.2002). Without citing either decision, the district court nonetheless dismissed the suit for want of subject-matter jurisdiction, see Fed.R.Civ.P. 12(b)(1), on the ground that it is a labor dispute in disguise and must be presented to the NLRB. See 2002 WL 31696701, 2002 U.S. Dist. LEXIS 24669, 171 L.R.R.M. 2355 (C.D.Ill. Oct.21, 2002). The district court

relied principally on *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Because *Commercial Cleaning Services* was commenced by a competitor rather than an employee, *Garmon* was not relevant to its disposition. But the plaintiffs in *Mendoza* were employees; that decision cannot be distinguished so easily – though for reasons that we discuss later it matters that the labor force in *Mendoza* was not unionized, while IBP's staff not only has an exclusive bargaining representative but also works under a collective bargaining agreement.

Subject-matter jurisdiction is the first question, as it must be in all suits filed in federal court. The district judge described *Garmon* as creating a rule of preemption and held that, because the labor laws preempt RICO, there is no federal jurisdiction. This reasoning is hard to follow. Federal statutes do not "preempt" other federal statutes, and, though one may repeal another implicitly if they are irreconcilable, RICO was enacted after the National Labor Relations Act. Federal laws *do* preempt state laws, but preemption is a defense and thus does not affect subject-matter jurisdiction. *Caterpillar Inc. v. Williams,* 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987); *Gully v. First National Bank,* 299 U.S. 109, 116, 57 S.Ct. 96, 81 L.Ed. 70 (1936).

Garmon held that state law may not regulate conduct arguably protected or arguably forbidden by federal labor laws. That is a genuine doctrine of preemption, with a jurisdictional overlay: federal labor law so occupies the field of labor relations that it is impossible to formulate a claim under state law. See *Avco Corp. v. Machinists Workers,* 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968). This misleadingly named doctrine of "complete

preemption" has jurisdictional significance in the sense that federal law's dominance allows removal under 28 U.S.C. § 1441(b) without regard to diversity of citizenship. See *Beneficial National Bank v. Anderson,* 539 U.S. 1, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003). Yet plaintiffs filed their case in federal court, exactly where the doctrine of "complete preemption" directs litigants. Federal courts are authorized to hear many labor-relations disputes by 29 U.S.C. § 185, and others by the federal-question jurisdiction. See *Teamsters v. Troha,* 328 F.3d 325 (7th Cir.2003). RICO is a federal statute, and a claim based on it therefore arises under federal law for purposes of 28 U.S.C. § 1331.

Applied to claims in federal court, and arising under federal law, *Garmon* has nothing to do with either preemption or subject-matter jurisdiction. It is a rule of primary jurisdiction, allocating to an administrative agency the first crack at certain matters. See, e.g., *Marquez v. Screen Actors Guild, Inc.,* 525 U.S. 33, 49-50, 119 S.Ct. 292, 142 L.Ed.2d 242 (1998). And the doctrine of primary jurisdiction is implemented by abstention – which means by staying rather than dismissing the litigation. See, e.g., *Arsberry v. Illinois,* 244 F.3d 558, 563-64 (7th Cir.2001). Once the agency has completed its work, the parties return to court for the resolution of any remaining issues. Here, for example, if the dispute were referred to the NLRB, and the Board determined that labor law neither protected nor prohibited IBP's conduct, the litigation could resume. Dismissal for want of subject-matter jurisdiction was inappropriate.

IBP has filed a cross-appeal, arguing that the district court's decision should be one on the merits (and thus with

prejudice to renewal later) rather than for lack of jurisdiction. Yet although dismissal under Rule 12(b)(1) was inappropriate, it does not follow that decision should have been rendered on the merits; abstention in favor of the Labor Board's primary jurisdiction remains an option that must be considered.

Garmon and its successors are principally about the relation between state and federal policy, but the doctrine applies even in federal-question cases that include issues within the Labor Board's charge. See *Laborers Health & Welfare Trust v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 552, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988). We applied this principle in *Talbot v. Robert Matthews Distributing Co.,* 961 F.2d 654, 662 (7th Cir.1992), to hold that a RICO action based on predicate acts that also violate federal labor law is incompatible with the NLRB's role in implementing labor policy. But it was vital in *Talbot* that "the underlying conduct of the plaintiffs' RICO claim [was] wrongful *only by virtue of the labor laws*" (*ibid.;* emphasis in original), something that cannot be said of plaintiffs' claim here. Section 274 of the Immigration and Nationality Act is not one of the federal labor laws; it post-dates the National Labor Relations Act and is in some respects incompatible with it. Although aliens may be "employees" for purposes of the NLRA, see *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 892, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984), those without proper visas do not receive the same benefits under the NLRA as persons whose employment is lawful. See *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002). When the predicate offenses of a particular claim under RICO are federal crimes other than transgressions of the labor laws, no dispute falls within

the Labor Board's primary jurisdiction, even if labor relations turn out to be implicated in some other fashion. See, e.g., *United States v. Palumbo Brothers, Inc.*, 145 F.3d 850, 861-63 (7th Cir.1998). If the predicates are state offenses that themselves would be preempted by *Garmon*, then invoking those laws indirectly through RICO does not evade that doctrine; but if the predicate acts are offenses that could be prosecuted directly (as charges under 8 U.S.C. § 1324 could be) without any *Garmon* problem, then it is difficult to see why invoking RICO in quest of treble damages gives the Labor Board a role.

How could a pattern of violating § 274 (the underlying activity that plaintiffs allege) be "arguably protected" or "arguably prohibited" by § 7 or § 8 of the National Labor Relations Act? IBP does not contend that hiring illegal aliens is even "arguably" protected by the NLRA. Nor does the NLRA prohibit or regulate the employment of aliens (see *Sure-Tan*); it is immigration law, not the NLRA, that distinguishes among categories of visa and thus determines which non-citizens are authorized to work. According to IBP, what is "arguably prohibited" by § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), is a failure to bargain with the union. "Failure to bargain in good faith" is the best classification of the activities alleged in plaintiffs' complaint, IBP insists. Yet employers must treat with unions only about mandatory subjects of collective bargaining, and then only at the union's request. See *Ford Motor Co. v. NLRB*, 441 U.S. 488, 99 S.Ct. 1842, 60 L.Ed.2d 420 (1979). Whether to hire illegal aliens is not a mandatory subject of bargaining; employers need not dicker with unions about which federal crimes to commit! Anyway, the union representing workers at IBP's Joslin facility has not asked to bargain about this subject, and it is not even arguably a

violation of the NLRA to refrain from bargaining about a subject that *neither* employer nor union wants to negotiate. In the absence of a request to bargain and a refusal to do so, no one could file a charge with the NLRB; in the absence of a (potential) charge the Board lacks primary jurisdiction of the dispute. Perhaps there could be room for bargaining between IBP and its unions over ancillary subjects, such as the precautions IBP takes when recruiting workers and evaluating the credentials applicants proffer. Yet plaintiffs do not contend that the union representing workers at Joslin has asked to bargain over this subject and been rebuffed; and if it *had* tried in vain to bargain, the union itself would be the aggrieved party. It, and not individual workers, would be the right party to file a charge that IBP had committed an unfair labor practice.

What IBP tries to characterize as a potential dispute about the *bona fides* of its bargaining strategy really has nothing to do with negotiations and everything to do with substance. The complaint alleges that IBP has expanded the pool of available labor and thus depressed the price that labor can command. When supply rises and demand is constant, price falls. Employers and unions bargain in the shadow of supply and demand; they do not bargain about what supply and demand will be. IBP concedes that the NLRB has never concluded that an employer violated the Act by expanding the supply of labor and thus depressing wages, or that the employer has any duty to bargain about efforts to augment the supply of labor. Employers regularly line up additional help; they may, for example, recruit and train persons who will serve as permanent replacements if the union strikes. This supply-expanding activity is lawful, see *NLRB v. Mackay Radio & Telegraph*

Co., 304 U.S. 333, 345-46, 58 S.Ct. 904, 82 L.Ed. 1381 (1938), and employers need not bargain with unions about it. Nor need employers bargain about other acts, such as closing plants and moving operations to places where labor is cheaper, that expand the effective size of the labor pool. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981) (adding, however, that the employer must bargain about what happens to employees dismissed in the closure).

To see the limited effect of *Garmon* on activity that affects the size of the labor pool, and thus the outcome of bargaining over wages, consider claims under the antitrust law that particular activities have unduly raised (or depressed) the price of labor and of goods made with that labor. Most arrangements between labor and management are protected from antitrust challenge by § 6 of the Clayton Act, 15 U.S.C. § 17, and a "nonstatutory exemption" to the Sherman Act. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 116 S.Ct. 2116, 135 L.Ed.2d 521 (1996). But some remain open to contest, see *Connell Construction Co. v. Plumbers Union*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975), and the Supreme Court has never thought that antitrust challenges to labor arrangements are forbidden by the *Garmon* doctrine because they arise from, or may affect, bargaining between unions and employers. Quite the contrary, the Court held in *Connell* that *Garmon* does not interfere with antitrust claims just because "labor law questions [may] emerge as collateral issues in suits brought under independent federal remedies". 421 U.S. at 626, 95 S.Ct. 1830. If *Garmon* does not block contentions that reduction of supply had driven the price of labor too high, it does not block contentions that seeking out new supply has driven the price too low. Many federal statutes

require courts to resolve issues that touch on labor relations. Consider ERISA: pension and welfare benefits often turn on the interpretation or validity of collective bargaining agreements, questions that courts resolve without the Labor Board's assistance. See, e.g., *Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir.1989) (en banc); *Moriarty v. Larry G. Lewis Funeral Directors Ltd.*, 150 F.3d 773 (7th Cir.1998). Just so with a claim under RICO.

Garmon preemption is only part of the battle for plaintiffs, however. Their wages were set by a collective bargaining agreement; the wages of persons working at the Joslin plant today are determined under a collective bargaining agreement. This suit is at its core about the adequacy of the wages IBP pays, and, if the NLRB is out, it still does not follow that plaintiffs are entitled to represent all of the other workers. They *have* a representative – one that under the NLRA is supposed to be "exclusive" with respect to wages, see 29 U.S.C. § 159(a) – their union. Individual workers may step into the union's shoes only if it has violated its duty of fair representation. See *Vaca v. Sipes*, 386 U.S. 171, 186, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Yet the complaint does not name the union as a party and does not contend that the union neglected its duty to represent the employees' interests with respect to wages.

Unless something went seriously wrong with the union's representation of the workers, IBP as the employer is not only entitled but also legally required to pay at the rates specified by the collective bargaining agreement. Without the union as a party, the litigants could not settle this suit for higher hourly pay (or back pay) – that would be a real refusal on IBP's part to bargain with its union –

nor could the judge order IBP to increase its rate of pay. Yet it is only financial relief that plaintiffs seek. As ex-employees, they could obtain nothing else. (Normally equity will not enjoin the commission of a crime, such as future violations of § 274. Whether RICO creates an exception to this rule in private litigation is a question that has divided the circuits, and that the Supreme Court did not resolve in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003).) Plaintiffs have not established the foundation for displacing the union as their representative with respect to wages. We don't say that this is impossible – for all we know, the union may be controlled by persons not authorized to work in the United States and may be pursuing a policy of expanding employment opportunities for those similarly situated – but only that plaintiffs have not tried.

Lest this be taken as an invitation to add the union as a party and start it anew as a hybrid RICO/DFR suit, we add that there is another fatal problem in this complaint: specification of the "enterprise." Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity". For purposes of this section, the "person" must be IBP, the only defendant. But how is IBP conducting the affairs of an enterprise through a pattern of racketeering activity? The complaint alleges that the "enterprise" is IBP plus the persons and organizations who help it find aliens to hire. We may assume that this congeries is a "group of individuals associated in fact although not a legal entity" (18

U.S.C. § 1961(4)) – though the complaint comes perilously close to alleging that IBP plus its agents and employees is the "enterprise," a theory that won't fly. See *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir.2003). And it is not altogether clear how this "association in fact" has a common purpose, an essential ingredient. See *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). IBP wants to pay lower wages; the recruiters want to be paid more for services rendered (though IBP would like to pay them less); the Chinese Mutual Aid Association wants to assist members of its ethnic group. These are divergent goals.

Even if the congeries is an enterprise, how is it that IBP operates or manages *that enterprise* through a pattern of racketeering activity? The nub of the complaint is that IBP operates *itself* unlawfully – it is IBP that supposedly hires, harbors, and pays the unlawful workers, for the purpose of reducing its payroll. IBP does not manage or operate some other enterprise by violating § 274; the complaint does not allege – and on appeal plaintiffs do not seek an opportunity to show – that IBP has infiltrated, taken over, manipulated, disrupted, or suborned a distinct entity or even a distinct association in fact. Contrast *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir.1986). Without a difference between the defendant and the "enterprise" there can be no violation of RICO. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227-28 (7th Cir.1997); *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F.2d 384, 401-02 (7th Cir.1984), affirmed on other grounds, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985).

These conclusions enable us to bypass still another potential problem with plaintiffs' theory: the difficulty of establishing that unlawful hiring of aliens caused a diminution in their wages. RICO provides treble damages for direct injuries but not remote ones. See *Holmes v. SIPC,* 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992). Although the ninth circuit concluded in *Mendoza* that the injury workers suffer when wages are depressed by competition from aliens is similar to the kind of injuries redressed under the antitrust laws, things may not be so straightforward. An increased supply of labor logically affects, not just the wages at IBP's Joslin plant, but wages throughout the region (if not the country). Workers can change employers (leaving IBP for higher pay elsewhere), and this process should cause equilibration throughout the labor market. Yet plaintiffs' theory is not that too many aliens depress wages around Joslin; it is that IBP pays lower wages than some competitors, and *that* effect would be very hard to attribute to particular violations of 8 U.S.C. § 1324(a)(3)(A). Suppose that plaintiffs believed that IBP has violated the Fair Labor Standards Act by failing to calculate other workers' overtime premium; could plaintiffs obtain damages from IBP even though it had paid *them* all that the FLSA requires? Cf. *Mid-State Fertilizer Co. v. Exchange National Bank,* 877 F.2d 1333 (7th Cir.1989). Given the other problems in this case, however, it is unnecessary to decide whether this circuit will follow *Mendoza* once the issue must be faced and resolved.

The judgment is modified from a dismissal for lack of jurisdiction to a dismissal for failure to state a claim on which relief may be granted. As so modified, it is affirmed.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DEBORAH BAKER and RICHARD ENYEART, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 02-4019
IBP, INC.,	)	
Defendant.	)	

ORDER

(Filed Oct. 21, 2002)

Before the Court is Defendant's Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6). For the following reasons, Defendant's Motion To Dismiss Pursuant to Rule 12(b)(1) [#9] is GRANTED. The Motion to Dismiss Pursuant to Rule 12(b)(6) is DENIED as moot. Plaintiffs' Motion for Leave to File Newly Decided Supplemental Authority [#25] is DENIED as moot.

BACKGROUND

Plaintiff Deborah Baker was an employee of Defendant, IBP, Inc. from early 1997 through April 1998. Complaint ¶ 44. Plaintiff Richard Enyeart was an employee of Defendant from 1997 through 2001. Complaint ¶ 44. On March 6, 2002, they filed this class action on behalf of all persons legally authorized to be employed in the United States who have been hired within the last several years by Defendant as hourly wage earners in its Joslin, Illinois, meat processing facility. Complaint ¶ 1.

Their Complaint alleges that Defendant knowingly employed undocumented, illegal immigrants for unskilled positions at its Joslin facility in an effort to reduce labor costs by driving down employee wages. Complaint ¶ 16.

Plaintiffs claim that for several years Defendant has relied upon a large network of recruiters throughout the world to identify and recruit illegal immigrants to work for Defendant. Complaint ¶ 20, 35, 37. Defendant allegedly pays these recruiters $200-$500 per employee, provides them with offices, and pays for other business expenses. Complaint ¶ 21. In exchange for these benefits, the recruiters must submit to supervision and strict discipline by IBP. Complaint ¶ 22.

As a result of these activities, IBP allegedly receives a constant stream of illegal immigrant workers, which enables it to pay a starting wage of approximately $9 per hour to both its legal and illegal unskilled employees. Complaint ¶ 24, 41. Workers in another meat processing facility approximately 50 miles from Joslin receive a starting wage of $13 per hour. Complaint ¶ 25, 43. According to Plaintiffs, the difference between this wage level and the wages paid by IBP is the direct result of Defendant's illegal hiring activity. Complaint ¶ 25.

In sum, Plaintiffs claim that they have been injured through their employment at depressed wages by IBP, which they claim is a direct, proximate and intended result of Defendant's alleged illegal hiring activity. Complaint ¶ 40. Therefore, Plaintiffs have brought this proposed class action pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* Complaint ¶ 5. They assert that Defendant's alleged activity violates the Immigration and Nationality Act,

8 U.S.C. § 1324(a)(1)(B), and constitutes a predicate offense under RICO. Complaint ¶ 33, 34.

ARGUMENT

Defendant argues that Plaintiffs' Complaint should be dismissed pursuant to Rule 12(b)(1) because this Court lacks subject matter jurisdiction. See Defendant's Motion to Dismiss ¶ 2. Defendant claims that at all times relevant to the Complaint, the wages paid to Plaintiffs were governed by union contracts. Therefore, Defendant argues, Plaintiffs' injury stems from alleged conduct governed by the National Labor Relations Act (NLRA), and this case falls within the exclusive jurisdiction of the National Labor Relations Board (NLRB). In sum, Defendant argues that Plaintiffs' RICO claim is preempted.

I. *Garmon*

As the Supreme Court has made clear, "When an activity is arguably subject to [sections 157 or 158] of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020, Bldg. Material and Dump Drivers, Local 36 v. Garmon*, 359 U.S. 236, 245 (1959). "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal. . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules. . . ." *Id.* at 242-43.

(quoting *Garner v. Teamsters, etc. Union*, 346 U.S. 485, 490-91.

As Plaintiffs point out in their Memorandum in Opposition to IBP's Motion to Dismiss for Lack of Subject Matter Jurisdiction, *Garmon* primarily focused on the conflict between federal and state law. "[C]ourts have indicated a hesitation to extend *Garmon* preemption to cases involving conflicts between the NLRA and other federal statutes." *United States v. Palumbo Bros., Inc.* 145 F.3d 850, 862 (7th Cir. 1998). Furthermore, "[c]ongressional intent behind one federal statute should not be thwarted by the application of another federal statute if it is possible to give effect to both laws." *Id.*

Nevertheless, the Seventh Circuit Court of Appeals has also recognized that "[t]he *Garmon* doctrine is designed to protect the primary jurisdiction of the NLRB" from federal courts as well as state courts "by providing the NLRB with exclusive jurisdiction to determine whether given conduct falls within the NLRA." *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 659 (7th Cir. 1992) (citations omitted); *see Palumbo Bros., Inc.*, 124 F.3d at 861 ("as a general rule, the NLRB preempts both federal and state claims based on conduct that is 'arguably prohibited' under the NLRA"). Thus, the NLRA can preempt civil RICO claims. *See id.* at 870-71 (" . . . RICO is not designed to protect the private rights of employees or unions; rather, their avenue for relief lies within the scope of labor grievance procedures or a LMRA lawsuit. If an employee or union attempts to disguise a legitimate labor dispute as a RICO claim, we recognize the potential conflict and appreciate why courts have applied either the NLRA or § 301 of the LMRA to preempt that civil RICO claim.").

II. *Talbot*

While it is true that the predicate acts alleged by Plaintiffs are not wrongful "only by virtue of the labor laws," *Talbot*, 961 F.2d at 662, Plaintiffs' alleged injury ceases to exist once the collective bargaining agreement is considered. Plaintiffs allege that they were injured "through their employment at depressed wages by IBP." Complaint ¶ 40. If these wages were set by the collective bargaining agreement negotiated by Plaintiffs' union as Defendant claims, however, then Plaintiffs no longer have any injury to complain of in this case.

Damages are an essential element of a RICO claim, as is causation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Once the collective bargaining agreement is considered, Plaintiffs can no longer allege damages, or if they can, they must first allege that Defendant's illegal hiring activity was a proximate cause of their injury because it infected the collective bargaining process. Once this necessary step is taken, the claim is preempted by the NLRA. Section 158(d) of that Act provides, "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages." 29 U.S.C.A. § 158(d) (1998). Plaintiffs must allege that Defendant failed to collectively bargain in good faith, and therefore that the wages agreed to in the collective bargaining agreement were the unlawful product of an unfair labor practice, or Plaintiffs will not be able to prove that they were damaged by Defendant's conduct, and they will not have standing under RICO. *See Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 268 (1992) (holding that standing under RICO requires a showing that the defendant's conduct was a "but-for" cause as well as a proximate

cause of the plaintiff's injury). Failing to bargain collectively in good faith is proscribed by section 158 of the NLRA, and "[w]hen an activity is arguably subject" to that section "of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *Garmon*, 359 U.S. at 245.

Plaintiffs correctly assert that "where a federal statute independently proscribes the conduct as well as the NLRA, the NLRA does not preclude enforcement of that statute." *United States. v. Boffa*, 688 F.2d 919 (3rd Cir. 1982), *quoted in Talbot*, 961 F.2d at 662. Plaintiffs apply this rule of law to Defendant's alleged illegal hiring practices, and argue that since the Immigration Act and RICO proscribe this conduct, which has nothing to do with the NLRA, preemption does not apply.

This Court finds that Plaintiffs' focus is misplaced. Preemption under the NLRA in this case does not stem form Defendant's alleged illegal hiring practices, but rather from Plaintiffs' allegation that they were injured by depressed wages. In order for Plaintiffs to prove damages in the form of depressed wages, they must first allege that Defendant bargained in bad faith. Without this allegation, Plaintiffs cannot show that they suffered depressed wages, since there is no allegation that Defendant did not pay the wages agreed to in the collective bargaining agreement. Once this necessary allegation is made, preemption is inevitable, because failing to exercise good faith in collective bargaining is wrongful "*only by virtue of the labor laws.*" *Talbot*, 961 F.2d at 662.

III. Rule 12(b)(6) Motion Distinguished

Plaintiffs correctly assert that if this Court were to consider the collective bargaining agreement proffered by Defendant as part of its Rule 12(b)(6) Motion to Dismiss For Failure to State a Claim, the 12(b)(6) Motion would be converted into a Rule 56 Motion for Summary Judgment. Rule 56 does not, however, govern a Rule 12(b)(1) motion when the Court looks beyond the complaint. *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986); *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990). As Judge Posner stated in *Crawford*,

> We are not being nitpickers in insisting on the difference between a jurisdictional determination and summary judgment. The purpose of summary judgment is to determine whether a trial can be averted. . . . But no case can properly go to trial if the court is not satisfied that it has jurisdiction. . . . The jurisdictional issue must be resolved first. [citation omitted]. The omission from the Federal Rules of Civil Procedure of a provision for converting a Rule 12(b)(1) motion into a summary judgment motion if evidence is submitted with it was not an oversight.

Crawford, 796 F.2d at 928; *see Osborn*, 918 F.2d at 729 ("It is 'elementary,' . . . that a district court has 'broader power to decide its own right to hear the case than it has when the merits of the case are reached.' [citation omitted] . . . Moreover, because jurisdiction is a threshold question, judicial economy demands that the issue be decided at the outset rather than deferring it until trial, as would occur with denial of a summary judgment motion.").

In sum, this Court is free to consider materials – including the affidavit of IBP's Complex Personnel Manager

and the collective bargaining agreements governing the Joslin facility from November 29, 1996 through March 5, 2006 – in determining whether it has subject matter jurisdiction over Plaintiffs' claims. *See Osborn*, 918 F.2d at 730.

IV. Summary Proceedings are Reasonable in this Case

When a defendant believes the trial court lacks jurisdiction, the "proper course is to request an evidentiary hearing on the issue." *Crawford*, 796 F.2d at 928. Oral testimony may not be required if affidavits and other documents are submitted. *Id.* The Court may treat the summary judgment procedures in Rule 56 "loosely as a form of trial by affidavit," looking "to those procedures for guidance in organizing a documentary inquiry into jurisdiction." *Id.* "No format is specified by statute or rule for evidentiary hearings on jurisdiction; any rational mode of inquiry will do. [citation omitted]. But the upshot must be a decision by the district court on jurisdiction – not a decision that there is or is not enough evidence to have a trial on the question."

Applying this rule, this Court finds that there is no genuine issue of material fact regarding whether Plaintiffs' wages were set through collective bargaining. The exhibits proffered by Defendant clearly show that at all times relevant to the Complaint, Plaintiffs' wages were governed by the collective bargaining agreements. See Defendant's Memorandum in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction, Exhibits 1 and 2. In their Memorandum in Opposition to IBP's Motion to Dismiss for Lack of Subject Matter Jurisdiction,

Plaintiffs do not deny that their wages were governed by the agreement. Rather, they argue that, "even assuming the authenticity of the collective labor agreements submitted by IBP in support of its motion, those agreements have nothing to do with this case and provide this Court with no basis for dismissing Plaintiffs' claims." Plaintiffs' Memorandum at 4 n.6. In these circumstances, this Court may conclude that there is no triable issue regarding whether Plaintiffs' wages were controlled by the agreements. *See Crawford*, 796 F.2d at 930.

Although Defendant did not formally request an evidentiary hearing on the issue of jurisdiction, it did submit an affidavit and documentary evidence, and Plaintiffs did reply. The Seventh Circuit has determined that "there is no set form for determining a contested issue of jurisdiction," and "[a] summary proceeding without oral testimony is fine if reasonable in the circumstances." *Id.* In this case, a summary proceeding is reasonable given the uncontested force of the collective bargaining agreements.

Therefore, even accepting all of Plaintiffs' well-pleaded facts as true and drawing all reasonable inferences in Plaintiffs' favor (*See Massey v. Wheeler*, 221 F.3d 1030, 1033 (7th Cir. 2000), this Court finds that Plaintiff's wages are governed by collective bargaining agreements with Defendant, that Plaintiffs will not be able to prove damages in the form of depressed wages without attacking the collective bargaining process, and therefore that Plaintiffs' claim is preempted by the NLRA. *See* 29 U.S.C.A. § 158(d). Because Plaintiffs cannot prove an essential element of their RICO claim (i.e., damages) without invoking preemption under the NLRA, dismissal pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is appropriate.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Pursuant to Rule 12(b)(1) [#9-1] is GRANTED. Defendant's Motion to Dismiss Pursuant to Rule 12(b)(6) [#9-2] is DENIED as moot. Plaintiffs' Motion for Leave to File Newly Decided Supplemental Authority [#25] is DENIED as moot. This case is dismissed without prejudice.

ENTERED this 21st day of October, 2002.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION

DEBORAH BAKER and RICHARD ENYEART, individually and on behalf of all others similarly situated, Plaintiffs, v. IBP, Inc., a Delaware Corporation Defendant.	No. 02-4019

COMPLAINT

(Filed Mar. 6, 2002)

I. NATURE OF ACTION

1. This is a class action brought on behalf of all persons legally authorized to be employed in the United States ("U.S.") who have been employed by defendant IBP, Inc. (IBP), one of the world's largest producers of fresh beef and pork-related beef products, as hourly wage earners in its Joslin, Illinois meat processing facility during the last four years.

2. The Complaint contends that all such persons have been victimized by a scheme perpetrated by IBP to depress the wages paid to its employees by knowingly hiring a workforce substantially comprised of undocumented illegal immigrants for the express purpose of depressing wages (hereafter "the Illegal Immigrant Hiring Scheme").

3. IBP perpetrates the Illegal Immigrant Hiring Scheme through a complex and highly disciplined network

of recruiters throughout the world, who obtain illegal immigrants, provide for their transportation to the U.S., housing in the U.S., documentation and other necessities of life so that they can be employed and exploited by IBP at depressed wages.

4. While the work at IBP's Joslin plant is grueling and extremely dangerous, IBP avoids paying what would otherwise be market wages to its employees as a result of IBP's perpetration of the Illegal Immigrant Hiring Scheme.

5. The Illegal Immigrant Hiring Scheme violates the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (RICO) and has directly and proximately caused the wages paid to plaintiffs and the class members to be substantially depressed, *i.e.*, below the level other meat processors in the surrounding area pay their employees, below the level in the area other employers of unskilled workers pay their employees, and well-below the wages that IBP would have to pay to attract a workforce composed entirely of lawful workers.

II. PARTIES AND JURISDICTION

6. Plaintiffs Deborah Baker ("Baker") and Richard Enyeart ("Enyeart"), U.S. citizens, were employed by IBP's Joslin, Illinois facility.

7. IBP is a corporation organized under the laws of the state of Delaware with its principal place of business in South Dakota. As alleged below, it has committed a pattern of racketeering activity in this district.

8. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 18 U.S.C. § 1964(a).

III. CLASS ALLEGATIONS

9. This action is brought and may be maintained as a class action pursuant to Fed. R. Civ. P. 23(b)(2) and (3). Plaintiffs bring this action on behalf of themselves and all other persons, legally authorized to be employed in the U.S., who have been employed by IBP at its Joslin, Illinois facility ("the Class").

10. The Class for whose benefit this action is brought is so numerous that joinder of all Class members is impracticable.. The actual number can only be ascertained through discovery of IBP's books and records.

11. Among the questions of fact and law that are common to the Class are:

- Whether IBP is engaging in the Illegal Immigrant Hiring Scheme;
- Whether IBP is doing so in order to depress its employees' wages;
- Whether the Illegal Immigrant Hiring Scheme has caused employees' wages to be depressed;
- Whether IBP conducts the Illegal Employment Hiring Scheme through its worldwide network of recruiters,
- Whether the Illegal Immigrant Hiring Scheme violates the Immigration and Nationality Act and RICO; and

- Whether IBP should be enjoined from conducting further racketeering activity and further association with its network of recruiters.

12. Plaintiffs' claims are typical of those of the Class in that they arise from the damages they have suffered as a result of the Illegal Immigrant Hiring Scheme. Plaintiffs seek no relief that is antagonistic to or adverse to other Class members.

13. Plaintiffs are committed to the vigorous prosecution of this action, and have retained counsel who are competent in the prosecution of class actions, RICO and complex litigation. Accordingly, Plaintiffs will fairly and adequately protect and represent the interests of the Class.

14. Questions of law or fact common to the Class predominate over issues affecting individual Class members. Therefore, a class action is the only appropriate method for the fair and efficient adjudication of this controversy for the following reasons, among others:

- The individual amounts of damages involved, while not insubstantial, are generally not large enough to justify individual actions;
- The costs of individual actions would unreasonably consume the amounts that would be recovered;
- Individual actions would unduly burden the judicial system; and
- Individual actions brought by Class members would create a risk of inconsistent

results and would be unnecessarily duplicative of this litigation. -

15. Plaintiffs anticipate no difficulty in the management of this action because the evidence proving the Illegal Immigrant Hiring Scheme is ascertainable through discovery, the identities of the Class members are known to IBP and damages can be calculated to a reasonable certainty through expert testimony.

IV. STATEMENT OF OPERATIVE FACTS

A. The Illegal Immigrant Hiring Scheme: Years of Racketeering Activity

16. For at least the last several years, IBP, which claims to employ over 50,000 workers, has aggressively engaged in an effort to reduce labor costs by driving down employee wages. Its primary strategy for doing so is the knowing employment of undocumented, illegal immigrants for unskilled positions in its processing facilities.

17. Illegal immigrants, because of their impoverished economic state, their desperate need for employment and their illicit presence in this country, tend to work for wages significantly below what a labor market comprised of U.S. citizens would pay.

18. They can also be exploited in other ways as well. Owing to their constant fear of apprehension by law enforcement authorities, IBP's illegal immigrant workers tolerate deplorable workplace conditions and do not file worker's compensation claims when they are injured on the job.

19. IBP's efforts at worker exploitation have been so successful that, as one investigative journalist found, the company has been able to "set the industry standard for low wages and poor working conditions."

20. However, IBP is unable to attract large numbers of illegal immigrants to work for the company on its own. Consequently, it relies upon a large network of recruiters throughout the world to identify qualified candidates for low wage unskilled labor, induce them to work for the company and often provide assistance in transportation to one of IBP's facilities, housing once there and other amenities.

21. IBP typically pays its recruiters $200-$500 per employee, often provides them with offices in their communities, and pays for other business expenses.

22. In exchange for these benefits, recruiters must submit to a regimen of strict discipline set by IBP. This regimen requires recruiters to carefully screen candidates so as [sic] employ only those with personality traits consistent with IBP's desired worker profile; typically, these are illegal immigrants who feel vulnerable, submissive, have little knowledge of the U.S. legal system and a pressing need for immediate employment. IBP enforces this profile by sending its employment personnel to meetings of prospective employees at the recruiters' offices. At these meetings, the IBP employees conduct oversight of the recruiters' prospective candidates and reject candidates who do not fit the profile. Recruiters who do not produce quality candidates have their pay cut, are disciplined by IBP or are terminated.

23. IBP instructs its recruiters to coach illegal immigrant workers to: (i) deny, if asked, that they have

been smuggled into the U.S.; and (ii) credibly present verification documents to IBP which both the recruiters and IBP know are falsified (and are typically supplied by the recruiter), all in an elaborate scheme to hide the illegal employment activity. Many such illegal immigrants are recruited in Morocco, and have their passage into the U.S. paid for by the recruiter. The recruiter then aids and abets their unlawful entry into the country where they are hired by IBP at employment "fairs" in New York City, Chicago and other locations.

24. The result is that IBP receives a constant stream of illegal immigrants seeking immediate employment. These workers accept unskilled positions at a starting wage of approximately $9/hour, no questions asked.

25. However, workers in another meat processing facility in the area receive a starting salary of approximately $13.00 per hour. The difference between this wage level and the wages paid by IBP is the direct result of the success of the Illegal Immigrant Hiring Scheme.

26. IBP employment personnel, including Mary Baylor at the Joslin, Illinois facility, hire these illegal immigrants with a wink and a nod, knowing they are being presented with falsified documents in order to establish work eligibility, including documents bearing names of former IBP employees who have left the company, green cards which have been purchased in IBP's parking lot (with her knowledge), non-existent social security numbers (which could be verified with a simple phone call to the INS), Illinois drivers licenses and state ID's which are obviously falsified, and other blatantly false documents.

27. Another IBP manager told a worker he knew to be illegal that he would be hired if he purchased a birth certificate and obtained an "Iowa ID."

28. The Joslin IBP facility has frequently been raided by the Immigration and Naturalization Service (INS). In one 1997 raid the INS apprehended 142 suspected illegal immigrants and returned 128 (voluntarily) back to Mexico the following day.

29. Since then, IBP has managed to obtain advance notice of INS inspections, and leaks word of the impending inspection. On inspection day, approximately half its workers are absent. (Other illegal workers, who were not tipped off, have hidden in frigid meat lockers for up to three hours, putting their lives at risk). Nevertheless, IBP happily takes the absent workers back the following day, no questions asked – even though IBP knows they fled from the INS.

30. Frequently, IBP rehires workers under a different name and social security number after the INS has informed IBP that the workers are illegal immigrants.

31. Plaintiffs are not aware of the precise number of illegal immigrants IBP employs at its Joslin facility, but on information and belief Plaintiffs allege that the number employed is over 250 per year, year in and year out, since the knowing employment of illegal immigrants became a RICO predicate offense in 1996. Plaintiffs believe approximately half of IBP's approximately 2000 workers at the Joslin plant are illegal immigrants, and the vast majority were hired by IBP with actual knowledge of their illegal status and further, with knowledge that they were smuggled into the U.S. and harbored in the U.S.

32. Additionally, the act of knowingly employing an illegal immigrant constitutes harboring such person, and each time IBP knowingly hires an illegal immigrant and/or provides such person with housing, it harbors that person from detection.

V. THE RACKETEERING ACTS

33. In order to perpetrate the Illegal Hiring Scheme, IBP has knowingly hired illegal workers that it knows to have been harbored and/or smuggled, in violation of § 274(a)(3) of the Immigration and Nationality Act ("the Act"), which provides that: "Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens . . . shall be fined under Title 18, or imprisoned for not more than 5 years, or both." 8 U.S.C. § 1324(a)(1)(B). Plaintiffs believe and thereon allege that IBP has committed at least ten violations of the Act in each year since 1996, with actual knowledge that each individual hired was smuggled into the U.S. and harbored once here, and that its violations are ongoing, continuous and will not stop without judicial intervention.

34. The violation of the Act is one of the predicate offenses under RICO. 18 U.S.C.§ 1961(1)(F).

VI. THE RICO ENTERPRISE

35. As detailed above, IBP has formed an ongoing association with its many recruiters throughout the world for the purpose of executing an essential aspect of the Illegal Immigrant Hiring Scheme, the identification and recruitment for employment of illegal immigrants who are

willing to be exploited by IBP. IBP could not successfully conduct the Illegal Immigrant Hiring Scheme without this enterprise, and its success in executing the Scheme for several years is the result of the discipline and single-mindedness it brings to this disparate group scattered throughout the world. Through IBP's management techniques, the group has functioned as a unit for years and continues to supply IBP with the illegal workers it needs to depress workers' wages at the Joslin, Illinois facility.

36. Additionally, the recruiters permit IBP to shift responsibility for much of the illegal activity to others, thereby using the enterprise as a front to facilitate more racketeering activity than it could possibly commit on its own.

37. For example, the Chinese Mutual Aid Association in Chicago is an IBP front organization. It combines both legitimate functions, offering services to newly-arrived immigrants, with illicit recruiting functions for IBP. IBP benefits from the large number of vulnerable immigrants (many illegal and undocumented) who pass through the organization's office, as it has a full-time IBP recruiter working on the premises distributing IBP employment applications. When that recruiter has gathered a significant number of "acceptable" candidates for IBP employment, he contacts IBP's employment office in Chicago. IBP sends an employment operative to the Chinese Mutual Aid Association office for a meeting at which IBP screens the candidates. If IBP approves of the recruiters' selections, IBP completes the employment process at the Chinese Mutual Aid Association and makes arrangements for the illegal immigrants to be bused as soon as possible to Joslin, Illinois, where IBP arranges for

temporary housing, thereby conducting pre-employment harboring of the illegal workers.

38. This association of IBP and its recruiters constitutes an association-in-fact enterprise affecting interstate or foreign commerce pursuant to 18 U.S.C. § 1961(4). However, the recruiters have existences apart from their affiliation with IBP. As stated, they conduct both legitimate and illicit activities. The illicit activities, facilitating IBP's Illegal Immigrant Hiring Scheme, are concealed and separated from their legitimate activities.

39. As stated above, IBP, a "person" within the meaning of RICO, has committed a pattern of racketeering activity (the Illegal Immigrant Hiring Scheme) through the association-in-fact enterprise with its recruiters since 1996. Section 1962(c) of RICO makes it illegal "[f]or any person . . . associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs . . . through a pattern of racketeering activity."

40. Plaintiffs and Class members have been damaged in their business and property rights through their employment at depressed wages by IBP. These injuries are the direct, proximate and intended result of the Illegal Immigrant Hiring Scheme, which is targeted at IBP's employees. These injuries were the intended and foreseeable consequence of the Illegal Immigrant Hiring Scheme and are compensable pursuant to Section 1964(c) of RICO.

41. There is only one reason for IBP's perpetration of the Illegal Immigrant Hiring Scheme: IBP knows that the Illegal Immigrant Hiring Scheme drives down the wages paid to *all* the workers at its Joslin facility.

42. As intended, the Illegal Immigrant Hiring Scheme has driven the wages paid to the legal workers at the Joslin plant well below the wages they would otherwise be receiving.

43. For example, workers at another meat processing plant approximately 50 miles from Joslin receive starting wages of approximately $4 (four) dollars an hour more than workers at the Joslin IBP plant. Upon information and belief, that plant, Farmland Foods of Monmouth, Illinois, does not knowingly hire illegal immigrants in order to drive down wages, and that crucial fact accounts for the difference in wages paid by the two meat processors.

VII. PLAINTIFFS' EMPLOYMENT BY IBP

44. Plaintiff Deborah Baker, a U.S. citizen, was employed to work at IBP's Joslin, Illinois facility from early 1997 through April 1998.

45. Baker was paid hourly wages of $7-9 dollars/hour, which rate was depressed as a result of the Illegal Immigrant Hiring Scheme.

46. Plaintiff Richard Enyeart, a U.S. citizen, was employed at IBP's Joslin, Illinois facility from 1997 through 2001 at wages varying between $7/hour and $9.42/hour, which at all times were depressed as a result of the Illegal Immigrant Hiring Scheme.

VIII. PRAYER FOR RELIEF

Plaintiffs demand judgment and other relief as follows:

A. Certification of the Class pursuant to Fed. R. Civ. P. 23(b)(3);

B. Judgment in an amount equal to three times the damage caused the putative Class by IBP's racketeering activity/the Illegal Immigrant Hiring Scheme, pursuant to 18 U.S.C.§ 1964(c);

C. Preliminary and permanent injunctions enjoining IBP from any further racketeering activity or any further association with its recruiters;

D. Appropriate attorney's fees, pursuant to 18 U.S.C. § 1964;

E. Trial by jury, pursuant to Fed. R. Civ. P. 38;

F. For any other relief the Court deems just and proper.

DATED: March 5, 2002.

Deborah Baker and
Richard Enyeart

By /s/ Robert K. Leyshon

Robert K. Leyshon
Winstein, Kevensky
& Wallace
224 18th St.
4th Floor
Rock Island, IL 61204
(309) 794-1515

Steve W. Berman
Andrew M. Volk
Hagens Berman LLP
1301 Fifth Avenue,
Suite 2900
Seattle, WA 98101
(206) 623-7292

Howard W. Foster
Johnson & Bell, Ltd.
55 E. Monroe St.,
Suite 4100
Chicago, IL 60603
(312) 372-0770

Attorneys for Plaintiffs

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 30, 2004

Before

Hon. JOEL M. FLAUM, Chief Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

DEBORAH BAKER and RICHARD ENYEART, *Plaintiffs-Appellants, Cross-Appellees*,		Appeals from the United States District Court for the Central District of Illinois.
Nos. 02-3967 & 02-4065	**v.**	No. 02-4019 Michael M. Mihm, *Judge*.
IBP, INC., *Defendant-Appellee, Cross-Appellant*.		

Order

Plaintiffs-appellants filed a petition for rehearing and rehearing en banc on February 18, 2004. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Supreme Court, U.S.
FILED
SEP 29 2004
OFFICE OF THE CLERK

No. 04-149

IN THE

Supreme Court of the United States

DEBORAH BAKER AND RICHARD ENYEART, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

IBP, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

DAVID B. JOHNSON
ERIC S. MATTSON
EMILY A. MILY
SIDLEY AUSTIN BROWN & WOOD LLP
Bank One Plaza
10 S. Dearborn Street
Chicago, IL 60603
(312) 853-7000

VIRGINIA A. SEITZ*
BRIAN T. FITZPATRICK
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondents

* Counsel of Record

September 29, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that a union is a necessary party to a suit brought by the employees for whom it is the exclusive bargaining representative when the employees seek hourly wages different from those set in the collective bargaining agreement between the union and the employer.

2. Whether the court of appeals correctly held that petitioners failed to state a claim under RICO, 18 U.S.C. § 1962(c), where the "person" is alleged to have conducted its own affairs – and not the affairs of any alleged "enterprise" – through a pattern of racketeering activity.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	5
I. THERE IS NO CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS ON THE QUESTION WHETHER A UNION IS A NECESSARY PARTY IN THESE CIRCUMSTANCES	5
II. THE SEVENTH CIRCUIT'S ALTERNATIVE RICO HOLDING IS CORRECT AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS	8
A. The Seventh Circuit Did Not Dismiss Petitioners' RICO Claim On The Ground That The Members Of The Enterprise Had Divergent Purposes	9
B. The Seventh Circuit Did Not Dismiss Petitioners' RICO Claim On The Ground That The Members Of The Enterprise Were Akin To A Family Of Corporations	12
C. Petitioners Agree That The Legal Rule Applied By The Seventh Circuit Is Correct (And Do Not Even Expressly Dispute Its Application)	13

TABLE OF CONTENTS – continued

Page

III. THIS COURT SHOULD NOT ABANDON ITS USUAL CRITERIA FOR CERTIORARI REVIEW BECAUSE THIS IS A CASE INVOLVING ILLEGAL IMMIGRATION 14

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

	Page
Board of Governors v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986)	15
Commercial Cleaning Servs., LLC v. *Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001)	10
EEOC v. *AT&T*, 506 F.2d 735 (3d Cir. 1974)	8
Forsberg v. *Pacific N.W. Bell Tel. Co.*, 622 F. Supp. 1147 (D. Or. 1985)	7
Hodgson v. *School Bd.*, 56 F.R.D. 393 (W.D. Pa. 1972)	7
Little Rock Sch. Dist. v. *Pulaski County Special Sch. Dist. No. 1*, 738 F.2d 82 (8th Cir. 1984)	8
Lynch v. *Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973)	7
Rodriguez v. *United States*, 480 U.S. 522 (1987)	15
Sedima SPRL v. *Imrex Co.*, 473 U.S. 479 (1985)	10
Trollinger v. *Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004)	1, 5, 6, 7
United States v. *Beasley*, 72 F.3d 1518 (11th Cir. 1996)	11
United States v. *City of L.A., Cal.*, 288 F.3d 391 (9th Cir. 2002)	8
United States v. *Jenkins*, 4 F.3d 1338 (6th Cir. 1993)	6
United States v. *Orena*, 32 F.3d 704 (2d Cir. 1994)	10, 11

STATUTES

8 U.S.C. § 1324(a)(3)	2
18 U.S.C. § 1962(c)	4

RULE

Fed. R. Civ. P. 19	3, 6, 7

TABLE OF AUTHORITIES – continued

OTHER AUTHORITY Page

7 Wright et al., *Federal Practice & Procedure* (3d ed. 2001) 7

INTRODUCTION

Petitioners erroneously claim that the decision below – which is a routine application of established legal rules under Fed. R. Civ. P. 19 and the Racketeer Influenced and Corrupt Organizations Act ("RICO") – creates two conflicts among the courts of appeals. With respect to Rule 19, the Seventh Circuit held that the union, which is the exclusive bargaining representative for hourly employees at respondent IBP, is a necessary party in a lawsuit to alter the terms and conditions of the collective bargaining agreement negotiated between that union and IBP. This is a routine and entirely correct application of Rule 19. See *infra* at 5-7. In the allegedly conflicting decision, the Sixth Circuit noted this issue, but did *not* decide it. It instead remanded the question, saying that "'[w]hether the Union should be joined . . . is . . . a matter for the District Court in the first instance.'" See *Trollinger* v. *Tyson Foods, Inc.*, 370 F.3d 602, 621 (6th Cir. 2004). Thus, no conflict exists.

Moreover, decision of the Rule 19 issue would not even resolve this case because it was only one of two independent grounds for the court's decision. Applying a rule of law that petitioners expressly endorse, see Pet. 12, the Seventh Circuit explained that to state a RICO claim, plaintiffs must allege that a "person" conducted the affairs of an "enterprise" through a pattern of racketeering activity. As petitioners acknowledge, the person and enterprise must be distinct. This is hornbook RICO law. The Seventh Circuit correctly held that IBP was accused of conducting its own affairs, not the affairs of any distinct enterprise, through alleged acts of racketeering.

Petitioners repeatedly mischaracterize the decision below – first, as adopting a rule that no RICO enterprise exists if the members of the enterprise have divergent purposes, and later as adopting a rule that no RICO enterprise exists because the

members of the enterprise are akin to a corporate family. Neither of these "holdings" appears in the Seventh Circuit's opinion. And petitioners never do business with the court's actual RICO holding requiring a separate RICO person and RICO enterprise – a requirement that reflects the established and uniform law in this area.

Finally, petitioners claim that enforcement of the immigration laws is so important that this Court must resolve the issue presented now and must interpret RICO in every particular in order to expand private immigration-law enforcement. This section of the petition is long on general information and short on reasons that would support this Court's review. The Court does not jettison its criteria for certiorari review because a case touches on immigration law, and neither question presented warrants review.

STATEMENT OF THE CASE

Respondent IBP owns a meat-processing facility in Joslin, Illinois. The employees of that facility are represented by an exclusive bargaining representative under the National Labor Relations Act ("NLRA"), and their wages are set by the collective bargaining agreement between their union and IBP. Pet. App. 10.

Petitioners are former employees of that facility. They sued IBP under RICO seeking to represent a class of current and former employees. Pet. App. 1. The only RICO predicate act alleged was that IBP knowingly hired illegal immigrants in violation of federal law, see 8 U.S.C. § 1324(a)(3)(A), Pet. App. 32. This allegedly depressed petitioners' wages by some $4 per hour. *Id.* at 2, 30, 35. They further alleged that IBP was in cahoots with immigrant welfare organizations to find the illegal immigrants it hired and that this "association-in-fact" was an illegal RICO enterprise. *Id.* at 12, 34. Their suit sought to recover lost wages on behalf of current and

former employees who were lawfully employed by IBP. *Id.* at 11, 24-36.

The district court dismissed the complaint without prejudice for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) on the ground that RICO claims for lost wages are within the primary jurisdiction of the National Labor Relations Board. Pet. App. 19, 23.

The Seventh Circuit disagreed with the basis of the district court's decision, and instead dismissed the complaint with prejudice for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Pet. App. 13. The Seventh Circuit found two independent reasons to dismiss the complaint:

First, the court held that the suit could not go forward because the union representing the bargaining-unit employees at IBP was a necessary party to the suit and had not been joined thereto. Pet. App. 10-11; see also Fed. R. Civ. P. 19. The court noted that under the NLRA, the union is the "'exclusive'" representative of IBP employees with respect to wages and all other terms and conditions of employment. Pet. App. 10 (citing 29 U.S.C. § 159(a)). Moreover, under the NLRA, as amended by the Labor Management Relations Act, IBP is "legally required to pay at the rates specified by the collective bargaining agreement." *Id.* Thus, the court held that "[w]ithout the union as a party, the litigants could not settle this suit for higher hourly pay (or back pay) . . . nor could the judge order IBP to increase its rate of pay." *Id.* at 10-11. Accordingly, because petitioners sought compensation for lost wages, the union was a necessary party, and the suit could not go forward in its absence. *Id.* at 11.

In addition, the court held that, even if petitioners were "to add the union as a party and start [the suit] anew," Pet. App. 11, "there is another fatal problem in this complaint: specification of the [RICO] 'enterprise,'" *id.* The court noted, *id.*, that a "*person*" violates RICO only if he "conduct[s] or participate[s] . . . in the conduct of [an] *enterprise's* affairs

through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (emphases added). The "person" alleged to have violated RICO – here IBP – must be distinct from the "enterprise," and it must be the enterprise whose affairs are being conducted through a pattern of racketeering activity. Pet. App. 11-12 (citing cases).

The court stated that "the complaint comes perilously close to alleging that IBP plus its agents and employees is the 'enterprise,' a theory that won't fly." Pet. App. 12 (citing cases). And the court further noted that it was "not altogether clear how th[e alleged] 'association-in-fact' has a common purpose." *Id.* But, the court gave petitioners a pass on both of these questions and assumed the successful allegation of an association-in-fact enterprise. *Id.*

The court held, however, that IBP was not operating or participating in the affairs of the alleged enterprise through a pattern of racketeering activity. This was because the only "racketeering activity" alleged was the hiring of undocumented workers, an activity performed by IBP alone. In light of this allegation, there was no difference between the "person" alleged to have violated RICO – IBP – and the "enterprise" alleged to be conducted through racketeering activity; IBP was the only entity alleged to have committed the predicate offense of "hir[ing], harbor[ing], and pay[ing] the unlawful workers," Pet. App. 12. Thus, as the court concluded, "[t]he nub of the complaint is that IBP operates *itself* unlawfully"; and "[w]ithout a difference between [IBP] and the 'enterprise' there can be no violation of RICO." *Id.*

Petitioners sought rehearing en banc which the court denied.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS ON THE QUESTION WHETHER A UNION IS A NECESSARY PARTY IN THESE CIRCUMSTANCES.

Petitioners contend that the Seventh Circuit's decision that the union is a necessary party to a suit seeking to modify the terms of a collective bargaining agreement conflicts with the Sixth Circuit's recent decision in *Trollinger* v. *Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004). Pet. 5-7. Petitioners are wrong. The Sixth Circuit has never decided this issue, and the Seventh Circuit's dismissal of this case rested not only on Fed. R. Civ. P. 19, but also on wholly independent, adequate grounds. No conflict between this case and *Trollinger* exists.

Like the decision below, *Trollinger* involved a RICO suit alleging that an employer had depressed wages by knowingly hiring illegal immigrants, 370 F.3d at 606. The Sixth Circuit noted the existence of the question whether the union was a necessary party, *id.* at 620-21. That court, however, did *not* disagree with the Seventh Circuit and hold that the union was not a necessary party. In fact, the Sixth Circuit *did not decide this question at all*. Instead, observing that the defendant had not raised the issue until after the court had heard oral argument, the court remanded the case to the district court for resolution of the question in the first instance. As the Sixth Circuit itself put it, "[w]hether the Union should be joined . . . is . . . a matter for the District Court in the first instance, and we leave it to the district court to address the issue on remand should the parties or the district court wish to pursue it." *Id.* at 621 (internal quotation marks and citation omitted).

The Sixth Circuit did express, in *dicta*, reservations about the Seventh Circuit's holding, *id.* ("Nor is it clear to us that *Baker*'s suggestion is correct."), but *dicta* in one circuit questioning a holding in another circuit does not create a circuit split. The court's *dicta* does not bind future panels in

that circuit, *e.g.*, *United States* v. *Jenkins*, 4 F.3d 1338, 1345 n.8 (6th Cir. 1993); thus, it is utterly speculative whether the Sixth Circuit will ever decide the issue in a manner contrary to the Seventh Circuit (or, indeed, whether it will ever decide the issue at all). The Sixth Circuit noted that its reservations were contingent upon facts that it did not have before it – facts that will be placed before the district court on remand. See 370 F.3d at 621 (noting that it was unclear whether the terms of the collective bargaining agreement "require[d] the participation of the union"). Thus, not only is the Sixth Circuit's discussion *dicta*, it is *dicta* that stops short of a hard conclusion and that was issued without the benefit of briefing or argument concerning the law and underlying circumstances. There is no conflict here.

Moreover, the decision below rested not only on the Rule 19 ruling, but also on independent, adequate grounds. See Pet. App. 11 (even if plaintiffs were "to add the union as a party and start [the suit] anew," the case would have to be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6)). Thus, decision of the Rule 19 issue would resolve neither a conflict nor even this case.

At best, accordingly, petitioners are asking this Court to expend its limited resources for nothing more than error correction. Even that insufficient argument would fail here, however, because there is no error for the Court to correct. Under Rule 19, a person "shall be joined as a party in the action if . . . in the person's absence complete relief cannot be accorded among those already parties." Fed. R. Civ. P. 19(a). The relief petitioners seek is the payment of wages different from those negotiated by their exclusive bargaining representative and set forth in the collective bargaining agreement, as well as an injunction somehow designed to prevent IBP from engaging in conduct in the future that may depress collectively-bargained wages. But, as the Seventh Circuit observed, IBP is "legally required to pay at the rates specified by the collective bargaining agreement." Pet. App.

10. "Without the union as a party, the litigants could not settle this suit for higher hourly pay . . . nor could the judge order IBP to increase its rate of pay." *Id.* at 10-11. It is thus clear that, without the union as a party, "complete relief cannot be accorded" petitioners, Fed. R. Civ. P. 19(a). See 7 Wright et al., *Federal Practice & Procedure* § 1620, at 316 (3d ed. 2001) ("[T]he union thus typically must be joined in employee-employer litigation involving the collective-bargaining agreement . . . .").

In expressing reservations about the Seventh Circuit's conclusion, the Sixth Circuit in *Trollinger* cited cases for the proposition that the union need not be joined to a suit to *enforce* a collective bargaining agreement. 370 F.3d at 621. But this is not a suit to enforce the collective bargaining agreement. The suit in this case seeks to *modify* the collective bargaining agreement by asking the Court, rather than the bargaining parties, to establish the hourly wage rates and to require IBP to pay its hourly work force a wage higher than the collectively-bargained rate. It is well established that in suits seeking the modification of the terms and conditions of a collective bargaining agreement, the union must be joined as a party. See *Forsberg* v. *Pacific N.W. Bell Tel. Co.*, 622 F. Supp. 1147, 1150 (D. Or. 1985) (ordering joinder of union where "plaintiff challenges specific terms of employment contained within the collective bargaining agreement and appropriate relief may require revision of those terms of employment"); *Lynch* v. *Sperry Rand Corp.*, 62 F.R.D. 78, 86 (S.D.N.Y. 1973) (ordering joinder of unions because "[h]aving negotiated with Sperry Rand over the contents of the collective bargaining agreements, the absent unions clearly have an interest in litigation which seeks to rewrite portions of those agreements"); *Hodgson* v. *School Bd.*, 56 F.R.D. 393, 395 (W.D. Pa. 1972) (ordering joinder of union where plaintiffs sought to "restructur[e] the compensation provisions of the collective bargaining agreement" by "increas[ing] the compensation of those certain of its

employees against whom it allegedly discriminates to the level of the other similarly situated employees"). Similarly, unions are routinely permitted to intervene as of right in litigation that might affect the terms and conditions of their collective bargaining agreements. See *EEOC* v. *AT&T*, 506 F.2d 735, 741-42 (3d Cir. 1974) (holding that union had a right to intervene because "its collective bargaining agreements with AT&T ... may well be modified or invalidated by the ... consent decree ... made in its absence"); *United States* v. *City of L.A., Cal.*, 288 F.3d 391, 400 (9th Cir. 2002) (same); *Little Rock Sch. Dist.* v. *Pulaski County Special Sch. Dist. No. 1*, 738 F.2d 82, 84 (8th Cir. 1984) (per curiam) (same).

II. THE SEVENTH CIRCUIT'S ALTERNATIVE RICO HOLDING IS CORRECT AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS.

After mischaracterizing the Seventh Circuit's decision below, petitioners spend a great deal of time asserting a number of imagined splits between the Seventh Circuit and various courts of appeals over two questions of RICO law. Neither of these questions, however, was the subject of a holding by the Seventh Circuit in this case. In contrast, petitioners appear to have no complaint at all with the Seventh Circuit's actual RICO holding – that to state a RICO claim, the plaintiff must allege that a "person" separate from the RICO "enterprise" participates in or conducts the affairs of that enterprise through a pattern of racketeering activity. Thus, there is no split here, and even petitioners have not identified an error for this Court to correct.

Petitioners rely primarily upon defects and confusion inherent in their complaint – and not any deficiency in the Seventh Circuit's opinion – to support their assertion that the decision below creates a conflict. A § 1962(c) RICO claim requires that (1) a person (2) conduct the affairs of a distinct enterprise (3) through a pattern of racketeering activity. The

complaint can be viewed from two perspectives, but either way it alleges only two of the three required elements. Viewed from one perspective, the complaint alleges that IBP was conducting its own affairs through the racketeering activity. Here it fails to allege the requisite distinction between the "person" and the "enterprise." Alternatively, if the enterprise is the association in fact of IBP and outside recruiters, then that *enterprise's* affairs are not being conducted through a pattern of racketeering activity. Thus, as we now show, the decision below reflects established RICO jurisprudence that does not conflict with the law of any other circuit.

A. The Seventh Circuit Did Not Dismiss Petitioners' RICO Claim On The Ground That The Members Of The Enterprise Had Divergent Purposes.

Petitioners first contend that the Seventh Circuit created a split with several other circuits by holding that no RICO enterprise existed in this case because the members of the alleged enterprise had "divergent goals." Pet. 9 & n.13 (internal quotation marks omitted). It is true that the Seventh Circuit noted that the members of the alleged association-in-fact enterprise in this case had divergent goals. See Pet. App. 12 ("IBP wants to pay lower wages; the recruiters want to be paid more for services rendered (though IBP would like to pay them less); the Chinese Mutual Aid Association wants to assist members of its ethnic group. These are divergent goals."). It is clear, however, that the court did not *hold* that these divergent goals were fatal to petitioners' RICO claim.

Instead, on the way to its *actual* holding, the Seventh Circuit simply questioned whether the petitioners had alleged an association-in-fact enterprise at all. The Court noted that the "complaint *comes perilously close* to alleging that IBP plus its agents and employees is the 'enterprise,' a theory that won't fly," as well as that "*it is not altogether clear* how this 'association in fact' has a common purpose, an essential ingredient," Pet. App. 12 (emphases added). In neither case,

however, did the court hold that the enterprise failed for these reasons; the court's phraseology – "comes perilously close" and "not altogether clear" – shows that these are not holdings. Rather, the court "assume[d] that this congeries is a 'group of individuals associated in fact although not a legal entity'" – *i.e.*, that this congeries *is* an enterprise. *Id.* at 11 (quoting 18 U.S.C. § 1961(4)). Put differently, petitioners have based the bulk of their petition on an issue that the court ultimately resolved in their favor. Moreover, all of the circuits are in accord (as they must be in light of this Court's decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496-97 (1985)) with the Seventh Circuit's actual holding – that in order to state a RICO claim, plaintiffs must allege that a "person" different from the RICO "enterprise" conducted or participated in the affairs of that enterprise through racketeering activity.

Indeed, even if the Seventh Circuit had held that the alleged enterprise failed for lack of common purpose, there would be no split with any of the cases cited by petitioners. The principal case they rely upon, the Second Circuit's decision in *Commercial Cleaning Services, L.L.C.* v. *Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir. 2001), Pet. 8-9, nowhere addresses the question whether a RICO enterprise exists when its members have divergent purposes. The decision is *completely silent* on both the question whether there were divergent purposes in the enterprise and the question whether the divergence undermined the RICO claim. Such silence does not create a circuit split.[1]

---

[1] Petitioners also rely on the Second Circuit's decision in *United States* v. *Orena*, 32 F.3d 704 (2d Cir. 1994). Pet. 11-12. It is true that the court there said that the "existence of an internal dispute" does not *necessarily* spell the end of an enterprise for RICO purposes. 32 F.3d. at 710 ("Rivalry and dissension, however violent, do not necessarily signify dissolution of a conspiracy." (internal quotation marks omitted)). The Second Circuit's notion that divergent purposes are not *necessarily* fatal to a RICO enterprise is not inconsistent with the Seventh Circuit's surmise

Petitioners' reliance on the Eleventh Circuit's decision in *United States* v. *Beasley*, 72 F.3d 1518 (11th Cir. 1996) (per curiam), Pet. 15-16, is similarly misguided. Although the court noted that some members of the enterprise – there a religious organization – did not participate in the predicate offenses, 72 F.3d at 1526 n.7, the court nowhere considered whether all the members of the organization were fundamentally at odds, or, more to the point, whether the RICO claim was undermined for that reason. And, again, the decision is entirely consistent with the Seventh Circuit's actual RICO holding. See *id.* at 1525-26 & n.7 (observing that the Yahweh Nation was the "enterprise" but that only some of its members were the "persons" prosecuted under RICO).

Finally, petitioners cite a number of cases in which courts have held that a legitimate business may be both a victim of a RICO scheme and a part of the RICO enterprise, Pet. 17-18. The Seventh Circuit nowhere takes issue with or even addresses this proposition. Of course, a business can be both a victim and a *part* of a RICO enterprise, but the business cannot be both the RICO person and the entirety of the RICO enterprise. Here, as the Seventh Circuit explained, the complaint alleged only "that IBP operates *itself* unlawfully," and *failed* to allege that IBP somehow participated in or conducted the affairs of "a distinct entity or even a distinct association in fact." Pet. App. 12. Thus, the Seventh Circuit's decision is necessarily based on its conclusion that the only alleged racketeering activity was conducted through IBP alone, not through the separate association-in-fact enterprise that the court assumed plaintiffs had adequately

---

that the enterprise *in this particular case* might fail. Moreover, although the Second Circuit found that the divergence was not fatal in *Orena*, it did so because the "reason for[] the dispute [was] control of the enterprise." *Id.* The divergent purposes in this case, by contrast, do not go to control over the enterprise, but instead to the question whether there *is* a RICO enterprise whose affairs are being conducted through racketeering activity. Thus, there is no conflict between even the *dicta* in this case and *Orena*.

alleged. This does not conflict with cases holding that a legitimate business may be both a victim of and a participant in a RICO enterprise. The notion that *some* members of an organization (*e.g.*, the victims) may not know that other members are engaged in criminal activity is wholly consistent with the Seventh Circuit's musing that an enterprise might not lie *if all of its members operated at divergent purposes.*

In sum, the premise of petitioners' conflict argument rests on a misreading of the Seventh Circuit's decision. And, even assuming against reality that the Seventh Circuit relied on the divergent-purpose rationale, there is no conflict between its reasoning and the other decisions cited by petitioners.

B. The Seventh Circuit Did Not Dismiss Petitioners' RICO Claim On The Ground That The Members Of The Enterprise Were Akin To A Family Of Corporations.

Petitioners also appear to contend that the Seventh Circuit's decision is in conflict with a number of other circuits because it held that "the enterprise alleged here [was like] a family of corporations under common ownership," and, therefore, was not distinct from IBP, the alleged RICO person. Pet. App. 12-13 (noting that the Seventh Circuit had previously held that "no distinctness is present between a corporation and its subsidiaries" (citing *Bachman* v. *Bear, Sterns & Co.*, 178 F.3d 930 (7th Cir. 1999))).[2]

One would look long, hard and in vain, however, for such a statement in the Seventh Circuit's opinion. Nothing in the opinion even hints that the court saw the enterprise here as deficient because it consisted of IBP and its corporate subsidiaries. The court said the enterprise might fail to the extent it consisted of "IBP plus its agents and employees,"

---

[2] Although the petition is not altogether clear, it appears that petitioners cite cases from the First, Second, Third, Fifth, Sixth and Ninth Circuits on the other side of this alleged split. *See* Pet. 13-15.

Pet. App. 12. Petitioners' corporate-family contention appears to be based on utter speculation that the court was following an earlier Seventh Circuit case – *Bachman* – that the court did not even cite. Thus, all of the cases petitioners cite as conflicting with the Seventh Circuit's "family of corporations" holding, Pet. 13-15, are wholly beside the point.

Moreover, even if petitioners had based their argument on the potential flaw the Seventh Circuit *did* observe in their alleged enterprise – that the enterprise alleged was solely IBP and its agents and employees – it is clear, as noted above, that this was not a holding of the court. The court opined that "the complaint *comes perilously close* to alleging that IBP plus its agents and employees is the 'enterprise', a theory that won't fly," Pet. App. 12 (emphasis added), before basing its holding on an alternative ground. Nor do petitioners attempt to demonstrate that the court's actual view is either wrong or in conflict with decisions of other courts of appeals. In any event, as also noted above, the court ultimately resolved this issue in petitioners' favor by "assum[ing] that this congeries *is* [an enterprise]." *Id.* at 11 (emphasis added) (citing 18 U.S.C. § 1961(4)). Petitioners are complaining about the lower court's skeptical musings when they agree with its ultimate conclusion. This Court does not review *dicta*, particularly where, as here, petitioners ultimately received the benefit of the doubt.

C. Petitioners Agree That The Legal Rule Applied By The Seventh Circuit Is Correct (And Do Not Even Expressly Dispute Its Application).

As noted several times above, what the Seventh Circuit *actually* held in this case was that petitioner alleged an "'enterprise'" that was not distinct from IBP because IBP is the sole defendant and only IBP is alleged to have been conducted through the predicate RICO offenses. Pet. App. 12. And on this point, petitioners *agree* that the Seventh Circuit followed the proper legal rule: "Under the person-enterprise rule, a distinction must exist between the 'person'

and the 'enterprise.' If no distinction can be drawn, the two concepts collapse, and the pleading is improper for a failure to plead distinct entities." Pet. 12. Petitioners do not – and could not – allege that the circuits are in conflict concerning this legal rule. Moreover, in the petition, petitioners do not even address, let alone dispute, the Seventh Circuit's conclusion that IBP was both the RICO "person" and the only RICO "enterprise" that was being operated through the requisite racketeering activity. Finally, even if petitioners had argued that the Seventh Circuit misapplied the established legal rule in this case, that would fall far short of the Court's standards for certiorari review.

The RICO holding at issue is correct and is not the subject of a conflict. Given that the Seventh Circuit's RICO holding is independent of its necessary-party holding, the petition should be denied on this basis alone.

III. THIS COURT SHOULD NOT ABANDON ITS USUAL CRITERIA FOR CERTIORARI REVIEW BECAUSE THIS IS A CASE INVOLVING ILLEGAL IMMIGRATION.

In the lengthiest section of their brief, petitioners detail the many burdens on American society caused by illegal aliens, implying that illegal immigration is such an important issue that this Court should hear any case that would further enforcement of the immigration laws, whether or not the Court's traditional criteria for certiorari review are met. Like national security, civil liberties, separation of powers and federal jurisdiction, federal immigration policy is undoubtedly important. This Court, however, has never subscribed to the notion that petitions raising issues touching on important social policies such as illegal immigration or health care receive special treatment or are entitled to a thumb on the scale. Otherwise, all such cases would be taken up by the Court. Moreover, there are many ways of enforcing the immigration laws, including federal government enforcement; and this case presents only a narrow aspect of *private*

immigration-law enforcement. Petitioners thus engage in hyperbole when they claim that decision of the issue presented here will have a significant impact on immigration-law enforcement.

In fact, petitioners alleging immigration-law violations do not get a free ride; they must present a legal issue warranting review, and petitioners here have utterly failed to do so. The Seventh Circuit's decision is not the subject of a conflict among the courts of appeals. In applying the NLRA and RICO, the court applied legal rules that are correct and well established. This Court's scarce resources should not be squandered on a case that involves only a (wholly correct) application of established law that is not, and may never be, the subject of inter-circuit conflict.

At its core, Part III of petitioners' brief is an argument that RICO must always be interpreted as broadly as possible to "energiz[e] the enforcement of provisions of the immigration statutes by the use of private attorneys general." Pet. 18. Petitioners effectively say that any reading of the statutory text that does not serve Congress's purpose of enhancing private immigration-law enforcement must be wrong. See *id.* at 28. The Court has already rejected petitioners' preferred form of statutory interpretation, because "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam). See also *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself . . . in the end, prevents the effectuation of congressional intent."). The Seventh Circuit read the text of RICO and applied that text as correctly and uniformly interpreted by the courts of appeals; and there is, accordingly, no need for this Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID B. JOHNSON
ERIC S. MATTSON
EMILY A. MILY
SIDLEY AUSTIN BROWN & WOOD LLP
Bank One Plaza
10 S. Dearborn Street
Chicago, IL 60603
(312) 853-7000

VIRGINIA A. SEITZ*
BRIAN T. FITZPATRICK
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondents

September 29, 2004

* Counsel of Record

(3)

No. 04-149

Supreme Court, U.S.
FILED
OCT 7 - 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

DEBORAH BAKER AND RICHARD ENYEART, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

IBP, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

G. ROBERT BLAKEY
Counsel of Record
NOTRE DAME LAW SCHOOL
Notre Dame, IN 46656-0780
(574) 631-5717

HOWARD W. FOSTER
JOHNSON & BELL, LTD.
55 East Monroe Street
Suite 4100
Chicago, IL 60603
(312) 372-0770

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

INTRODUCTION

Respondent IBP's (hereafter "IBP") Brief In Opposition (hereafter "Opp. Br.") to the Petition has failed to respond to Petitioners' First Question Presented – whether § 159 of the National Labor Relations Act (29 U.S.C. § 159) precludes Petitioners from suing IBP. By addressing itself to a different question, Fed. R. Civ. P. 19,[1] which was not raised below and is not part of the First Question, IBP tacitly concedes that the Seventh Circuit's holding in this case, that union members cannot sue their employer, is indefensible. It conflicts with every other circuit's case law.

As to Petitioners' Second Question Presented, the split created by the Seventh Circuit's holding that the members of a RICO enterprise must have common "goals," IBP barely takes up the challenge. It contends the case was decided on another RICO question. This is simply not so. The *Baker* court expressly stated the Complaint failed to "specify" a RICO enterprise – a holding that will give every criminal indicted under the statute a strong basis for dismissal.

Finally, IBP says nothing at all about the national crisis caused by untrammeled illegal immigration. This is made all the more apparent by the 9/11 Commission Report. It concluded, "[I]n cities with large immigrant populations . . . [a] large population lives outside the legal framework. Fraudulent documents could easily be obtained. Congress kept the number of INS agents static in the face of the overwhelming problem." Commission Members, *The 9/11 Commission Report*, GOV'T PRINTING OFF. at

---

[1] Hereafter the Federal Rules of Civil Procedure shall be referred to as "Rule __."

80-81 (2004). The Seventh Circuit has effectively taken away the one and only tool private citizens have to enforce the immigration laws, civil RICO – a remedy Congress expressly enacted in 1996. The tragic irony of such a decision, and its timing, cannot be overstated. For this reason alone, the Petition satisfies the "important federal question" criteria of Supreme Court Rule 10(c).

1. IBP HAS VIOLATED SUPREME COURT RULE 14 BY FAILING TO RESPOND TO PETITIONERS' FIRST QUESTION

Supreme Court Rule 14 provides that "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." IBP violated this Rule by raising Fed. R. Civ. P. 19, *which was not cited by the Seventh Circuit or the Petition.* We note, too, that Respondent did not file a cross petition. Its new matter is not before this Court.

The Seventh Circuit held Petitioners cannot sue IBP because their union retains the "exclusive" authority to negotiate wages, pursuant to 29 U.S.C. § 159(a) – *not Rule 19.* Pet. App. 11. Thus, the Seventh Circuit's holding conflicts with the Sixth Circuit's holding on this precise question in *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 621 (6th Cir. 2004) (rejecting the *Baker* court's conclusion that the union had such an exclusive right). This split of authority cannot be any clearer and may bar all employee class actions under other statutes such as the Fair Labor Standards Act and Title IX. Accordingly, the criteria for certiorari have been established. Supreme Court Rule 10(a) (a decision is "in conflict with the decision of another United States court of appeals on the same important matter . . .")

2. IBP'S CONTENTION THE UNION IS A NECESSARY PARTY IS IN CONFLICT WITH THE OTHER CIRCUITS

However, if in its discretion the Court considers the new Question Presented as posed by IBP, the split among the circuits is even more pronounced. The proposition that Rule 19 requires joinder of the union in an employee class action has been expressly repudiated time and again. *See Diaz v. Schwerman Trucking Co.*, 709 F.2d 1371, 1375 (11th Cir. 1983) (concluding in an employee action for back pay the union is not a necessary party under Rule 19, relying upon *Vaca v. Sipes*, 386 U.S. 171 (1967), the only authority the Seventh Circuit cited in support of its view of the law); *Social Services Union, Local 535 v. Santa Clara Co.*, 609 F.2d 944, 947 (9th Cir. 1979) (holding that whether a union is adequate to represent a class of employees in a wage rate dispute was a factual question to be determined in a case-by-case basis); *Afro Am. Patrolmen's League v. Duck*, 503 F.2d 294, 298 (6th Cir. 1974) (affirming denial of union's motion to intervene in employee class action); *see generally* 7 Wright et al., *Federal Practice & Procedure*, Civ. 3d, § 1620 (2001) (examining the labor-management decisions interpreting the necessity of the union as a party pursuant to Rule 19).[2]

---

[2] The Seventh Circuit has expressly rejected IBP's interpretation of Rule 19 in two class actions. *See Air Line Stewardesses Assn. Local 550, TWC, AFL-CIO v. American Airlines, Inc.*, 490 F.2d 636, 642 (7th Cir. 1973) (holding that union members could replace the union as representative of the employees and resolve claims on their behalf in a class action); *Local 194 Retail v. Standard Brands Inc.*, 540 F.2d 864, 865 (7th Cir. 1976) ("The union does not, however, have standing to seek, on behalf of the class, back pay or other individualized forms of monetary relief," holding that unions may only sue if they have organizational standing pursuant to *Warth v. Seldin*, 422 U.S. 490 (1975)).

In conclusion, IBP's argument that the Seventh Circuit's *per se* requirement that the union be named in an employee lawsuit is contrary to every other circuit. There is no such rule, and Rule 19 has never been interpreted in this manner. As the *Trollinger* court correctly held, there is no *per se* rule either requiring or barring union intervention in an employee lawsuit. This is reflected by Rule 23.2, which expressly authorizes class actions "by or against the members of an unincorporated association as a class action . . ." The Seventh Circuit has effectively repealed the right of Petitioners to sue in this manner. This split, too, might well warrant resolution.

3. IBP HAS MISINTERPRETED THE SIGNIFICANCE OF THE SEVENTH CIRCUIT'S DECISION ON RICO JURISPRUDENCE

IBP devotes the majority of its brief to dissuading this Court that *Baker* held that the Complaint failed to state a RICO claim because it believed IBP and its recruiters could not constitute an association-in-fact RICO enterprise. The Seventh Circuit described the perceived defect as "specification of the enterprise." *Baker*, 357 F.3d at 691; Pet. App. 11. Lest doubt is still posed, the Court declared this defect to be "fatal" to the RICO claim. *Id.* IBP devotes most of its brief in support of its view that the fatal flaw in the RICO claim was something else entirely – that IBP was alleged to be both the 'person' and the 'enterprise.' Opp. at 14 (asserting that the dismissal was because "IBP was both the RICO person and the only RICO enterprise . . .") (internal quotations omitted). Yet, IBP fails to explain how this alleged pleading defect can be characterized as the failure to "specify" a RICO enterprise. IBP takes this tack because it cannot dispute that a legitimate split

exists as to whether the members of a RICO enterprise cannot have "divergent goals." In fact, *Baker* is a radical departure from established RICO jurisprudence. If it is allowed to stand, the statute will no longer be an effective weapon against enterprise criminality. Rather than dispute this, IBP simply asserts the dismissal (but not what it characterizes as "dicta") was actually premised upon a different sub-theory. Will indicted racketeers acquiesce in IBP's interpretation of the Opinion? Petitioners believe these divergent interpretations of the RICO enterprise should be resolved now.

CONCLUSION

For the reasons noted above and discussed in the Petition, the Court should grant the Petition for writ of certiorari.

Respectfully submitted,

G. ROBERT BLAKEY
Counsel of Record
NOTRE DAME LAW SCHOOL
Notre Dame, IN 46556-0780
(574) 631-5717

HOWARD W. FOSTER
JOHNSON & BELL, LTD.
55 E. Monroe Street
Suite 4100
Chicago, IL 60603
(312) 372-0770

Attorneys for Petitioners